CONFIRMATION OF FEDERAL JUDGES

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

THE SELECTION AND CONFIRMATION OF FEDERAL JUDGES

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CONFIRMATION HEARING ON:

JAMES T. MOODY, MICHAEL S. KANNE, ALAN C. NELSON, AND ROBERT H. BORK

WEDNESDAY, JANUARY 27, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:05 p.m., in room 2221, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Simpson, Grassley, Metzenbaum, and Baucus.

Staff present: Duke Short, chief investigator, and Pamela Swanner, clerk.

The CHAIRMAN. The committee will come to order.

NOMINATION OF JAMES T. MOODY, MICHAEL S. KANNE, ALAN C. NELSON, AND ROBERT H. BORK

This hearing is on the nomination of James T. Moody and Michael S. Kanne to be district judges of the U.S. District Court of the Northern District of Indiana; Alan C. Nelson to be Commissioner of the Immigration and Naturalization Service; and Robert H. Bork to be U.S. circuit judge for the District of Columbia Court of Appeals.

I am told that Senator Lugar has a very urgent necessity for leaving here as quickly as possible. Senator Hayakawa, would it suit you to let him go first?

Senator HAYAKAWA. I will be glad to yield.

The CHAIRMAN. Senator Lugar, if you will come around, we will be glad to hear from you.

Senator LUGAR. Mr. Chairman, should the two candidates join me at this time?

The CHAIRMAN. We would be very pleased to have them come around. Judge Kanne and Judge Moody.

STATEMENT OF HON. RICHARD G. LUGAR, A U.S. SENATOR FROM THE STATE OF INDIANA

Senator LUGAR. Mr. Chairman, I am deeply indebted to you and to our colleague, Senator Hayakawa, for this opportunity to make a statement of introduction of James T. Moody and Michael S. Kanne to be judges of the U.S. District Court in the Northern District of Indiana.

It is my pleasure to introduce to this committee James Moody and Michael S. Kanne, who have been nominated by the President of the United States to serve as Federal judges for the U.S. District Court in the Northern District of Indiana. Confirmation of these two excellent nominees is extremely important to the Northern District of Indiana. That district has had at least one judicial vacancy for several consecutive years, and an enormous backlog of 1,971 cases has accumulated.

A graduate of Indiana University Law School in 1963, James Moody has had a distinguished career in both the private and public sector. For the last 9 years James Moody has served admirably in a public capacity as a Supreme Court judge in Lake County and as U.S. Magistrate for the Northern District of Indiana.

Born in Rensselaer, Ind., and also a graduate of Indiana University Law School in 1968, Michael Kanne has had a lengthy and impressive career as a practicing attorney and for the last 10 years as a judge for the 30th Judicial Circuit of Indiana.

It is worth noting, Mr. Chairman, that this is the first time in over 30 years that the populated areas of Lake County in northwestern Indiana would be represented on the Federal court by individuals who are from that region.

Mr. Chairman, while reviewing the qualifications of these nominees the Justice Department observed that they were among the strongest candidates they have reviewed for any judicial position in the country. At a time when our judicial system is coming under increased pressure and workload, it is encouraging to know that young, vigorous, and able nominees like James Moody and Michael Kanne are on the way to the Federal bench.

I am deeply indebted to you for this opportunity to present these candidates.

The CHAIRMAN. Well, we are very pleased to have you come, Senator. Of course, your recommendation is what caused them to be nominated and I know they are grateful to you.

I will say to these nominees that the fact that you have recommended them so highly sends them off to a good start right now. We are very pleased to have you. If you want to stay, you stay. If you have to go, we will understand.

Senator LUGAR. I will retreat, with your permission.

The CHAIRMAN. Thank you.

Senator LUGAR. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Quayle I understand has also approved these gentlemen but he cannot be here.

Senator LUGAR. He will be on his way, I understand.

The CHAIRMAN. Well, he may come later.

Now I believe, Senator Hayakawa, we will take you next. I am very pleased to have you with us, Senator.

STATEMENT OF HON. S. I. (Sam) HAYAKAWA, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator HAYAKAWA. Mr. Chairman, it is my privilege today to introduce to you Mr. Alan C. Nelson, the President's nominee for the position of Commissioner of the Immigration and Naturalization Service.

I am particularly concerned about the difficult problems and sensitive issues that the INS is facing. For this reason, I am pleased that the President has selected as his nominee for Commissioner a person who is intimately familiar with the needs of this very important agency.

Mr. Nelson was appointed Deputy Commissioner of the INS last year and is currently serving in that capacity. I am certain that his experience as Deputy Commissioner will prove to be extremely valuable, particularly as it will remove the need for any on-the-job training; he has already had that.

The nominee has had extensive experience in both the private and public sectors since graduating from the University of California's School of Law in 1955. After spending several years in private law practice, he was appointed deputy district attorney for Alameda County in 1964. He continued to serve until 1969, when he was named assistant director of the California Department of Human Resources Development. In 1972 he accepted an appointment as director of the California Department of Rehabilitation. He returned to the private sector in 1976 when he became the general attorney for the Pacific Telephone & Telegraph Co. I do not doubt that his impressive experience has provided the necessary tools to step into the position of Commissioner of Immigration and Naturalization.

I had the privilege of becoming acquainted with Mr. Nelson last summer at a meeting in San Francisco. We have discussed mutually the problems of illegal aliens and farmworkers in California. We have discussed a number of matters having to do with immigration and I am very much impressed with his command of the subject.

I am, therefore, proud to have the opportunity today to introduce Mr. Alan Nelson to my colleagues. I thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Well, since such a fine, able Senator has endorsed you, Mr. Nelson, I am sure you will have no trouble. You just have a seat back there for now.

Thank you very much, Senator, for your appearance here in behalf of Mr. Nelson.

Senator HAYAKAWA. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Bork, I believe, is the highest ranking person we are considering here today to be circuit judge of the District of Columbia.

Mr. Bork, I guess I had better swear you in to start with.

Do you swear that the testimony you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. BORK. I do.

The CHAIRMAN. Do you have any members of your family here? Would you like to introduce them, if you do?

Mr. BORK. My son Charles is here, Senator.

The CHAIRMAN. We are glad to have you with us. Is he a lawyer, too?

Mr. BORK. I have always hoped he would be, Mr. Chairman, but he is not. The subject is still under discussion. [Laughter.]

TESTIMONY OF ROBERT H. BORK, NOMINEE, U.S. CIRCUIT JUDGE, DISTRICT OF COLUMBIA COURT OF APPEALS

The CHAIRMAN. Do you have a prepared statement?

Mr. BORK. No, I do not, Mr. Chairman.

The CHAIRMAN. I believe you were born in Pittsburgh, and your legal residence is here in the District of Columbia. You have three children, I believe, Mr. Bork.

Mr. BORK. That is correct.

The CHAIRMAN. You attended the University of Pittsburgh and graduated from the University of Chicago, I believe, with a B.A., and a J.D., also from the University of Chicago.

You were in the service from 1945 to 1946 and then from 1950 to 1952 in the Marine Corps.

Mr. BORK. That is correct.

The CHAIRMAN. Why did you leave in 1946 and then go back, or were you called back the second time?

Mr. BORK. I enlisted in the Reserves while I was in college, after I got out the first time, and they called up the Reserves in the Korean war.

The CHAIRMAN. Then you have had various experience here. I believe from 1977 to 1981 you were Chancellor Kent professor of law at Yale Law School.

Mr. BORK. Yes, Mr. Chairman. I actually became the Alexander M. Bickel Professor of Public Law.

The CHAIRMAN. The Alexander Bickel Professor of Public Law, 1979 to 1981. You are now with Kirkland & Ellis, a law firm here in the District.

Mr. BORK. That is correct.

The CHAIRMAN. Mr. Bork, you are a very widely respected legal scholar in the field of antitrust and constitutional law, I believe. Your numerous, informative writings and books are scrutinized by both students and professors of the law.

One such article which appeared in the 1971 Indiana Law Journal entitled "Neutral Principles and Some First Amendment Problems," contains statements which have caused some individuals to suggest that you may feel that the first amendment protects only speech which is explicitly political. Will you discuss this article, and in particular give your response to the charge of limiting first amendment protection to political speech?

Mr. BORK. Of course, to begin with, Senator, the first amendment protects the free exercise of religion and the freedom of the press as well as speech. Within the speech area, I was dealing with an application of Prof. Herbert Wechsler's concept of neutral principles, which is quite a famous concept in academic debate. I was engaged in an academic exercise in the application of those principles, a theoretical argument, which I think is what professors are expected to do.

It seems to me that the application of the concept of neutral principles to the first amendment reaches the result I suggested. On the other hand, while political speech is the core of the amendment, the first amendment, the Supreme Court has clearly expanded the concept well beyond that. It seems to me in my putative

function as a judge that what is relevant is what the Supreme Court has said, and not my theoretical writings in 1971.

The CHAIRMAN. Mr. Bork, in your book, "The Antitrust Paradox," you stated that the only goal that should guide interpretation of the antitrust laws is the welfare of consumers. While consumers' welfare is certainly one of the concerns that Congress had in enacting the antitrust laws, other concerns such as preserving competition and maintaining the viability of small business have played a role in formulating antitrust policy. Would you please comment on the validity of these other goals?

Mr. BORK. Well, I think, Senator, that we desire competition—which is one of the other goals you have mentioned—primarily because competition does benefit consumers. Therefore, I think when you say "protect competition" you are talking about protecting consumers.

The antitrust laws do, of course, in many of their aspects protect the viability of small business but in general we do not protect the viability of small business at the expense of consumers in the antitrust field. For example, price fixing might benefit some small businesses. On the other hand, there is a per se rule against it and that is because, when there is a conflict in the antitrust laws, in general we protect competition and consumers rather than small business.

The CHAIRMAN. Mr. Bork, your book is highly critical of a number of Supreme Court antitrust cases, and you have urged rejection of prohibitions against such traditional antitrust violations as tie-in arrangements, exclusive dealing, predatory price cutting, and price discrimination.

If you are confirmed as a judge of the Court of Appeals, would you feel yourself obliged to follow Supreme Court precedent even though you may greatly disagree with its application in a particular case?

Mr. BORK. Mr. Chairman, it seems to me that a lower court judge owes a duty of absolute obedience to Supreme Court precedent. If that were not true, the legal system would fall into chaos, so that my personal views certainly cannot affect my duty to apply the law as the Supreme Court has framed it.

The CHAIRMAN. Mr. Bork, the phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority. What does the phrase "judicial activism" mean to you, and how do you feel about judicial activism?

Mr. BORK. Mr. Chairman, I think what we are driving at is something that I prefer to call judicial imperialism.

The CHAIRMAN. Imperialism?

Mr. BORK. Imperialism, because I think a court should be active in protecting those rights which the Constitution spells out. Judicial imperialism is really activism that has gone too far and has lost its roots in the Constitution or in the statutes being interpreted. When a court becomes that active or that imperialistic, then I think it engages in judicial legislation, and that seems to me inconsistent with the democratic form of Government that we have.

The CHAIRMAN. Mr. Bork, how do you feel personally about your own capacity at this point in your career to carry out the very significant power and responsibility of being a circuit court judge?

Mr. BORK. Mr. Chairman, I can only speak to my experience. I have spent a number of years in private practice, which I think gave me a practical view of the law as it operates. I have spent a number of years as a professor at Yale, which I think gave me a theoretical understanding of some problems of the law; and of course for almost 4 years I served as Solicitor General, which seems to me a combination of both the practical and the theoretical.

As to my personal capacities or abilities, that is a matter in the first instance for the President to judge, then for this committee, and finally for the Senate.

The CHAIRMAN. I do not think I have any other questions.

Do you have any?

Senator GRASSLEY. None, Mr. Chairman.

The CHAIRMAN. Do you have anything else you would like to say?

Mr. BORK. No, Mr. Chairman. Thank you.

The CHAIRMAN. Senator Baucus, do you have any questions?

Senator BAUCUS. Yes, I do, Mr. Chairman, a few brief questions.

Mr. Bork, I want to thank you for appearing before us and I want to congratulate the President on his nomination of you. I think there is no doubt that you are eminently qualified to serve in the position to which you have been nominated. There is no doubt in my mind that you will be confirmed, and I hope very quickly and expeditiously.

There are two areas, though, I would like to briefly inquire about. The first is your view of efforts on the part of Congress to remove Supreme Court jurisdiction of certain constitutional issues. As I recall, when you appeared before this committee in hearings on S. 158, the Human Life Statute, you stated that in your view that bill and in some other cases Supreme Court jurisdiction, was unconstitutional.

Even though you personally may agree with the underlying thrust in trying to overturn what in your view are incorrect Supreme Court decisions, you felt it was improper and, more importantly, unconstitutional for the Congress to attempt to remove Supreme Court jurisdiction over constitutional issues. Is that a fairly accurate statement of your view?

Mr. BORK. I think that is entirely an accurate statement of my view, Senator Baucus.

Senator BAUCUS. Do you still hold to that view? Is that still your personal view?

Mr. BORK. Yes, it is.

Senator BAUCUS. Could you also indicate to this committee why in your view it would be unconstitutional for Congress to pass a statute that would limit Supreme Court jurisdiction over a Federal constitutional question?

Mr. BORK. Well, the attempt to eliminate Supreme Court jurisdiction as opposed to lower court jurisdiction would have to rest upon the exceptions clause of article 3 of the Constitution, which allows Congress to make such exceptions and regulations of the Supreme Court's appellate jurisdiction as it desires. Literally, that language would seem to allow this result.

I think it does not allow this result because it was not intended as a means of blocking a Supreme Court that had, in Congress

view, done things it should not. The reason I think it was not intended is that clearly in the most serious kinds of cases, where the Supreme Court might do something that the Congress regarded as quite improper, the exceptions clause would provide no remedy.

For example, if the Supreme Court should undertake to rule upon the constitutionality or the unconstitutionality of a war, and the Congress was quite upset, thinking that is not the Supreme Court's business, as indeed I agree it is not, to use the exceptions clause to remove Supreme Court jurisdiction would have the result not of returning power to the Congress but of turning the question over to each of the State court systems. We could not tolerate a situation in which 50 States were deciding through their own judges the constitutionality of a war.

Senator BAUCUS. Well, as I hear you, I hear you address the question more on a policy ground. Apart from the policy ground——

Mr. BORK. No, I do not think that is a policy ground, Senator. I think that is a constitutional argument. One of the ways of construing the Constitution, as Chief Justice Marshall showed us so well in *McCulloch* v. *Maryland,* is to argue from its structure: What is the necessity of Government? Would the framers have done something that led to results like this?

I think the answer is that the framers would not have devised a check upon the judiciary which does not return power to the Congress but returns power to the State judiciary systems, from which it probably cannot be removed. When one perceives that that is the result, then I think one has to say the framers did not intend the exceptions clause as that kind of a check upon the Court. I do not know any way to apply the Constitution that I regard as legitimate other than in terms of the intent of the framers, as best as that can be determined.

Senator BAUCUS. Could you tell me your view of whether the constitutional amendment process as outlined in article V of the Constitution is sufficient to enable the country and the Congress to respond to what it regards as improper Supreme Court decisions?

Mr. BORK. I think there is a real dilemma, Senator. I think in a variety of areas the Court over a period of years has reached results that were not intended by the framers of the Constitution or by the framers of the various amendments. I think to that degree the Court has stepped into areas that do not belong to it. It is that form of judicial activism or judicial imperialism that the chairman asked me about.

I do not think there is an adequate way of checking the Court provided in the Constitution, and I think the reason for that is that the framers never anticipated judicial review could become the enormous power that it has become. There was no court at the time that had any power resembling that.

The only cure for a Court which oversteps its bounds that I know of is the appointment power, and in addition to that the power of debate, political rebuke, and, I hope one day a better understanding by the profession and by the judges of what the limits of judicial power are.

Senator BAUCUS. What about the amendment process?

Mr. BORK. The amendment process is certainly useful but it is very hard to use. It is very hard to get the Constitution amended, and if you have a Court which frequently oversteps the bounds you cannot keep amending the Constitution every time that happens. We would be in a constant state of turmoil.

Senator BAUCUS. Well, do you recommend that some other device other than what we presently have under our present Constitution be formulated and enacted?

Mr. BORK. Senator, I do not recommend that. I would like to think about that long and hard. I think it is a very grave matter to start changing the Constitution and shifting balances of power. I do not reject it out of hand, either. I do not mean to say that. I simply have not thought that through, and I would like to think long and hard before I came down one way or the other.

Senator BAUCUS. Let me read from your statement when you testified on S. 158. It is very brief, just three sentences:

The question to be answered

this is you speaking

In assessing S. 158 is whether it is proper to adopt unconstitutional countermeasures to redress unconstitutional actions by the Court. I think it is not proper. The deformation of the Constitution is not properly cured by further deformation.

I frankly find that a very cogent and very articulate statement. Do you still hold to that statement today?

Mr. BORK. I do, Senator.

Senator BAUCUS. One other area I would like to turn to is the Watergate era, with which you are very familiar. I will give you a chance to state for the record your personal thoughts on what happened when the then-Attorney General resigned.

As I recall history, the Attorney General would not fire Special Prosecutor Cox, and the Acting Attorney General who replaced him, Mr. Ruckleshaus, also resigned, because of his unwillingness to fire Mr. Cox. You, then, the Solicitor General, became the Acting Attorney General and did fire the Special Prosecutor.

I would like to give you the opportunity to state what your thoughts were at the time and why you took the action that you did in view of the reluctance of your two immediate predecessors to take the same action.

Mr. BORK. Well, Senator, I would be delighted to answer that because it seems to me that that is a story which, although I have testified about it and given press conferences about it, has never quite been gotten straight.

Senator BAUCUS. When you are answering, too, I would appreciate if you could tell me the reasons why your predecessors refused to fire Mr. Cox. My understanding is that under the law he could only be removed for cause.

Mr. BORK. Under the charter that Elliott Richardson, then Attorney General, had given to Mr. Cox, the Special Prosecutor could only be removed for cause. That is true. That charter could be revoked, of course.

There was a lawsuit about whether the charter should have been revoked on Saturday night before he was fired, and whether therefore the firing was illegal under the charter until it was revoked. I regard that as an argument about a 36-hour period. The reason the

charter was not revoked before he was fired was that there was no staff around to do the necessary work. Monday morning the charter was revoked.

I do not think that issue of which order it should have come in and whether the thing was illegal for 36 hours is important. I think the important issue is the one you go to, Senator, which is the moral issue.

Attorney General Richardson had made those promises not to fire the Special Prosecutor, to this committee and through this committee to the Senate. He therefore could not discharge Mr. Cox when that confrontation between the President and Mr. Cox occurred, and I quite agree that Attorney General Richardson took the right position.

Deputy Attorney General Ruckleshaus felt that Mr. Richardson had brought him into the Deputy Attorney General's spot, as he had not me—I was not brought in by that Attorney General—and Bill Ruckleshaus felt that he was bound by his own statements to the Senate through this committee and by Elliott Richardson's representations.

During that afternoon, which was the only time I had to think about this because this came upon me quite suddenly—I was not involved in this whole ruckus—I discussed the point at length with Bill Ruckleshaus while Elliott Richardson was at the White House, and he agreed that my moral position therefore was different. I had a moral choice to make, not encumbered by the charter. I had made no such representations, and therefore I had a moral choice to make free of those problems they had.

I would make two points about the decision to discharge: One is that there was never any possibility that that discharge of the Special Prosecutor would in any way hamper the investigation or the prosecutions of the Special Prosecutor's office. Neither the President nor anyone else at the White House ever suggested to me that I do anything to stop or hinder in any way those investigations. If I had been asked to do that, I would not have done it.

The next day after the discharge there was a meeting in my office on Sunday. I brought in Henry Peterson, who was then the head of the Criminal Division of the Department of Justice, and I brought in Mr. Cox's two deputies, Henry Ruth and Phillip Lacovara.

At that meeting I told them that I wanted them to continue as before with their investigations and with their prosecutions, that they would have complete independence, and that I would guard that independence, including their right to go to court to get the White House tapes or any other evidence they wanted. Therefore, I authorized them to do precisely what they had been doing under Mr. Cox.

When I named Mr. Leon Jaworski later as the Special Prosecutor, I made the same promises and representations to him and those promises were kept. They were independent; they remained independent; they went to court. The investigations went forward with the results we all know and are now a part of American history. At no time was there any threat to the integrity of the processes of justice.

The second point I want to make is simply this, and that is the reason for the discharge. The point I have just made is why there was no harm to justice from the discharge. The reason for the discharge was that I had, I thought, to contain a very dangerous situation, one that threatened the viability of the Department of Justice and of other parts of the executive branch.

The President and Mr. Cox had gotten themselves, without my aid, into a position of confrontation. I have explained why the Attorney General and the Deputy Attorney General could not discharge Mr. Cox, and why my position was not the same as theirs because I had not made the representations and the assurances that they had, although I did make them to the people who came after Mr. Cox.

I was third in line in the Department of Justice, and the Acting Attorney Generalship came to me automatically by operation of Department regulation. I was not appointed Acting Attorney General; I became Acting Attorney General the moment those two gentlemen resigned. There was nobody after me in the line of succession, nobody. If I resigned, there was simply nobody who stepped into that position.

At that point, the President was committed because of this symbolic confrontation to discharging Mr. Cox. He would have appointed, I assume, an Acting Attorney General and he probably would have had to go outside the Department of Justice to do so. Perhaps one of the White House lawyers would have been appointed Acting Attorney General and would have discharged Mr. Cox. There was never any question that Mr. Cox, one way or another, was going to be discharged.

At that point you would have had massive resignations from the top levels of the Department of Justice. I talked to those people, the other Assistant Attorneys General and their deputies. If that had happened, the Department of Justice would have lost its top leadership, all of it, and would I think have effectively been crippled.

For that reason I acted, made the discharge, called the Department together, the leaders together, told them why I had done it, talked to a number of them in private. None of them left; they all stayed with me, stayed with the Department.

Therefore, that was my choice, Senator. On the one hand there was no threat to the investigations from the discharge and no threat to the processes of justice. On the other hand, I preserved an ongoing and effective Department of Justice. The only thing that weighed against doing what I did was personal fear of the consequences, and I could not let that, I think, control my decision.

Senator BAUCUS. I appreciate your answer. Obviously our country was going through very difficult times during that period. I thought we both had an obligation to discuss this because you are going to be sitting as a Federal judge There are some people who would like to know what happened, what you were thinking at the time, what your motives were, what the explanations were for your actions. I think your statement today helps explain all of that and I appreciate that statement very much.

In America, sometimes I think that perhaps public officials, perhaps members of this body, should resign on the basis of principle

more often than we do. However, that is a side issue; it is not central to the point here under discussion today.

I wish you very well as you serve on the court.

Mr. BORK. Thank you, Senator.

The CHAIRMAN. The distinguished Senator from Ohio.

Senator METZENBAUM. Mr. Bork, it is a pleasure to see you here this afternoon. I am sorry if I am late.

I am familiar with your views with respect to antitrust legislation, antitrust enforcement, and you and I are totally in disagreement on that subject. However, as I said at the time Justice O'Connor was up for confirmation, the fact that my views might differ from hers on any one of a number of different issues would not in any way affect my judgment as pertains to confirmation or failure to confirm a member of the judiciary.

However, having said that, I have some concerns—and I think that Senator Thurmond has already addressed himself to some of those concerns. My concerns are not that your views might differ from mine but whether or not you would interpret the law on the basis of heretofore decided Supreme Court decisions.

Your entire book is a comprehensive attack on the current antitrust laws, and by your own admission these are the laws on the books as interpreted by the highest Court in the land. It was a great disappointment to me when Mr. Baxter appeared before our committee and indicated that notwithstanding that, he did not feel any obligation to enforce those laws. I think he was wrong.

I do not think you are in that position. You are not up for confirmation as an enforcement official. The concern that I have is whether or not you will be able to wholeheartedly apply the laws as previously interpreted by the Court, or are you going to start trimming them and cutting into them here and there to suit your own ideas, not of what is the law but what is good economic sense.

I guess I know even in asking the question that you have no alternative but to say, "No, I am not going to. I am going to follow the law," and yet I think it is appropriate that we put into the record your response.

Mr. BORK. I think so, Senator. I think my response has to be along the lines of the response I gave to the chairman about the problem of judicial activism. I have long been opposed to judges who write their own views into the law rather than what they think, on the basis of principled interpretation, the law is. I would be false to those views if I interpreted the antitrust laws in a way that I did not think the law really was or in a way contrary to the interpretation given to them by the Supreme Court.

I think that is true of any field of law. I assume, Senator, that in fields I have never written about and therefore nobody can really question me about, that I will often think that the law I am called upon to apply is not a terribly good law.

However, that is not my business as a judge. My business, particularly as a lower court judge, is to be obedient to the Supreme Court's interpretation of the law. Otherwise, our legal system falls into chaos. The Supreme Court cannot take enough cases every year to straighten out all of the lower court judges if they all began to interpret the law according to their own views rather than ac-

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cording to the Supreme Court's views. Therefore, to be a good judge is to be obedient to precedent as it stands.

Senator METZENBAUM. You wrote in your book, "Disregarding the value of efficiency, a majority of the Court for a long time struck down every merger that came before it. Subsequent decisions allowing some mergers have by no means repaired the damage. The result is a merger law that deserves to be called an antitrust statute about as much as the Smoot-Hawley tariff did."

Mr. BORK. I have a gift, Senator, for colorful phrase occasionally which I now regret. [Laughter.]

Senator METZENBAUM. On page 406 of your book—I really wish I could say to you I have read every page—I did not but my staff did—on the antitrust paradox you argue that one way to beef up antitrust enforcement in the price-fixing area—one of the few areas, I might say, where you have indicated that you think antitrust enforcement is appropriate—you have indicated that one of the ways to beef up antitrust enforcement in the price-fixing area is by beefing up antitrust field office staffs.

In light of this, what is your reaction to recent Justice Department decisions to close some of its antitrust field offices and to transfer many of the antitrust field office attorneys—I think about 20 out of 100 or 110—to the U.S. attorneys' offices?

Mr. BORK. I am not familiar with this, Senator. Will they perform the antitrust function out of the U.S. attorney's office?

Senator METZENBAUM. Unclear.

Mr. BORK. Well, I am not familiar with it. It may be a budget measure, in which case I have no idea about it, but if an antitrust capacity were put in each U.S. attorney's office you would obviously have many more antitrust field offices than you do now.

My concern is that I think the field offices typically enforce the law within a rather small radius of the office, which means I think a lot of price-fixing is going on in communities that are never visited by a Department of Justice lawyer. Perhaps if you put the function into the U.S. attorneys' offices you would have a much greater coverage of the country. I have no idea of what that proposal is or what it accomplishes.

Senator METZENBAUM. I have no further questions, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Senator Grassley.

Senator GRASSLEY. I have no questions.

The CHAIRMAN. Senator Baucus?

Senator BAUCUS. May I ask one or two very brief questions?

Mr. Bork, following up on the first question of Senator Metzenbaum, concerning judicial activism, as you know the charge of judicial activism tends to be leveled by those who feel that a court or a judge has been too liberal. The charge generally has not been leveled by liberals against conservative judges who are too active in their conservatism on the court.

When you talk about judicial imperialism, are you referring to liberal activism or conservative activism or both?

Mr. BORK. In our time, Senator—by that I mean in the era of roughly 1955 or 1960 onward—courts have been active or imperialistic in what is loosely referred to as a liberal direction, an egalitar-

ian direction. Prior to 1936 or 1937, the Court was imperialistic or active in a conservative direction. I think both of those are equally improper.

Senator BAUCUS. As a judge, you would not indulge in either?

Mr. BORK. To the best of my understanding of a particular case, I would not.

Senator BAUCUS. What would you do as a judge when a case appears before you and it is clear that Congress did not contemplate the situation before you? You know, they have legislated all around it and the issue squarely before you has to do with a matter that clearly Congress did not contemplate. Would you intervene and try to decide what Congress would have decided, or how would you handle that situation?

Mr. BORK. Senator, that is often the case.

Senator BAUCUS. Maybe that is why I am asking the question. That is right.

Mr. BORK. I see nothing wrong with a judge attempting to deal with that. Holmes said that courts properly make law interstitially, in between the areas where Congress has made law. I think the best you can do is look at the overall policy thrust of the statute or the program that you are dealing with and attempt to resolve the unknown area in line with that policy thrust.

There may be occasions in which Congress has made no decision, even about the basic policy. Sometimes one sees a statute in which it is quite vague what choice Congress made. I do not know what I would do in a case like that.

Senator BAUCUS. However, the more a judge tries to decide the interstitial cases, the more isn't he indulging in activism? Why shouldn't a judge decide, "Well, Congress has not addressed this situation. Therefore, the party claiming relief or bringing the action in the first place is not entitled to relief or to a judgment, again because Congress has not provided for that situation?"

Mr. BORK. Well, I think, Senator it depends upon these matters of degree. There are times when Congress has written a law which is clearly intended to cover this kind of situation but they never contemplated quite this one, so you have no direct order. I do not think it is activism, and if it were activism I think statutes would be unenforceable because if you had to go only by what Congress had specifically and explicitly contemplated, most cases would never fall within the statute. Now there are other cases in which the matter is so far outside the statute that you simply ought to say it is not covered by the statute.

Senator BAUCUS. One more question: How strongly do you adhere to the principle of stare decisis?

Mr. BORK. Well, I think as a court of appeals judge one has to adhere to it very strongly, and that is to follow the lead of the Supreme Court. It is less clear, for example, about precedent within a single court and whether that court should follow it or not.

For example, if a court became convinced that it had made a terrible mistake about a constitutional ruling in the past, I think ultimately the real meaning of the Constitution ought to prevail over a prior mistake by the court. If that were not true, the commerce clause would still be as limited as it was in 1936.

Senator BAUCUS. I understand that, and I agree in large part with what you said, that is, as a lower Federal court judge the principle of stare decisis applies much more strongly to Supreme Court decisions than it would within a single court.

While you are here, though, and I have a chance to pick your brain a little, do you have any general guiding principles as to when a Supreme Court judge should adhere to the principle in looking at, revisiting Supreme Court issues?

Mr. BORK. Well, yes. I think it is a parallel to what Thayer said about the function of a judge when he is reviewing a legislative act for constitutionality. He said he really ought to be absolutely clear that it is unconstitutional before he strikes down the legislative act, if not absolutely clear, awfully clear.

I think the value of precedent and of certainty and of continuity in the law is so high that I think a judge ought not to overturn prior decisions unless he thinks it is absolutely clear that that prior decision was wrong and perhaps pernicious.

Senator BAUCUS. I appreciate that, Mr. Bork.

Mr. Chairman, I want to thank you for the time that you have taken.

Actually, Mr. Bork, I suppose these are questions that I will address you in your next hearing before this committee.

The CHAIRMAN. Mr. Bork, I want to thank you for your appearance and your testimony here. You have a very fine reputation as being an able lawyer and a dedicated public servant, so I would anticipate that the committee will approve you. Of course, no one can ever guarantee it but I wish you good luck.

Mr. BORK. Thank you very much, Mr. Chairman.

The CHAIRMAN. Senator Quayle, you have two judges here from Indiana, Judge Kanne and Judge Moody. In a few minutes they will testify but I do not want to hold you up, and we will take you now if you care to say anything about these gentlemen.

STATEMENT OF HON. DAN QUAYLE, A U.S. SENATOR FROM THE STATE OF INDIANA

Senator QUAYLE. Thank you very much, Mr. Chairman. I certainly appreciate all the cooperation that you have given me.

As has been outlined by Senator Lugar, the character and professional competence of Michael Kanne and James Moody are unassailable. Further, their judicial careers exhibit compatibility with the ideals and the philosophy espoused by the present administration. They understand and adhere to the view that the primary responsibility for policymaking lies with the executive and legislative branches of Government, and that the judiciary should confine itself to just resolution of specific cases and issues.

Mr. Chairman, I just briefly want to point out the need for additional judges in the northern district. As of December 31, 1981, there were 1,904 civil cases pending in this district and 67 criminal cases. Since 1975 the number of cases for the Fort Wayne division alone has more than doubled. While the Hammond division covers only two counties, it accounts for the bulk of the backlog in the district. The bench, the bar, and the leaders in these communities are

in agreement with the urgent need for these two fine nominees before you today.

I just want you to know, Mr. Chairman, that I noted your cooperation, you individually and your committee and your staff. You do a fine job and we certainly appreciate the quick attention that you have given us on these matters and other matters and other matters to come before you. You will not be let down.

I ask unanimous consent that the entire text of my remarks appear in the record.

The CHAIRMAN. Senator Quayle, the high endorsement in which you are held by the Members of the Senate makes your approval of these gentlemen here very advantageous to them. We are very pleased to have you with us.

Senator QUAYLE. Thank you very much.

[The prepared statement of Senator Quayle follows:]

PREPARED STATEMEMT OF SENATOR DAN QUAYLE

Mr. Chairman, I thank you for the opportunity to testify in support of the nominations of Judge James Moody and Judge Michael Kanne to be United States District Judges for the Northern District of Indiana. I have total confidence in both these fine judges and in their fitness to serve the Northern District.

They are professionally equipped to handle the responsibilities that go with these Federal judicial appointments. They are men of extraordinary character, legal scholarship, and professional experience.

After graduation from the Indiana University School of Law, Judge Moody engaged first in private practice and then served as City Attorney of Hobart, Indiana. From 1972 to 1979, Judge Moody served with distinction as Superior Court Judge for Lake County, Indiana. Since 1979, he served as United States Magistrate for the Northern District of Indiana. Throughout his judicial career, Judge Moody has earned his reputation as a jurist of the highest integrity, common sense and fairness.

Judge Kanne, as well, has enjoyed a long and varied legal career. After graduation from the Indiana University School of Law and service in the United States Air Force, he engaged in private practice in Rensselaer, Indiana. Soon thereafter, in 1972, Judge Kanne began his distinguished term of service on the Jasper County Circuit Court. While sitting on the Circuit Court, Judge Kanne has, since 1976, also been a lecturer on Constitutional Law at St. Joseph's College in Indiana. Like Judge Moody, Judge Kanne has consistently earned the respect and admiration of his colleagues in the field of law.

Mr. Chairman, I believe that the character and professional competence of these two men are unassailable. Further, their judicial careers exhibit their compatibility with the ideals and the philosophy espoused by the present Administration. They understand and adhere to the view that the primary responsibility for policy making lies with the executive and legislative branches of government, and that the judiciary should confine itself to the just resolution of specific cases and issues.

The need for an additional judge in the Northern District is clear. As of December 31, 1981, there were 1904 civil cases pending in this District, and 67 criminal cases. Since 1975, the number of cases for the Fort Wayne Division alone has moe than doubled. While the Hammond Division covers only two counties, it accounts for the bulk of the backlog in this District. The Bench, the bar, and leaders in the

community are in agreement on the urgent need for these two fine nominees before you today.

It is imperative that these nominations be expeditiously considered by the Committee and confirmed by the Senate.

To sum up, Mr. Chairman, Judge Moody and Judge Kanne are two examples of tremendous commitment and achievement to everyone who works in the field of law and strives for exellence. I am certain that their service in the Northern District will bring honor to Indiana and to our nation.

The CHAIRMAN. Now we will take Judge Kanne. Judge Kanne, you and Judge Moody both can come around if you want to and we will give you both the oath at the same time.

Stand and raise your hands to be sworn.

Do you swear that the testimony you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge KANNE. I do.

Judge MOODY. I do.

The CHAIRMAN. Now, Judge Kanne, would you like to introduce any members of your family who may be here?

Judge KANNE. Yes, Mr. Chairman, thank you very much. I am not sure my youngest daughter is awake yet because she is yawning. If my wife, Judith Ann, will stand, and my daughter Anne and daughter Kate, I would like to introduce them. Apparently my youngest daughter has awakened for this part of the proceeding.

I would like to also extend my thanks to Senator Lugar for his confidence in me, as well as Senator Quayle, and the nice words they have spoken, and certainly the President and also this committee for the courtesy extended to me. I will be glad to answer any questions you may have.

The CHAIRMAN. Anything else you would like to say?

Judge KANNE. I will be glad to answer any questions, Mr. Chairman.

TESTIMONY OF JUDGE MICHAEL S. KANNE OF INDIANA, NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF INDIANA

The CHAIRMAN. I believe you were born in Rensselaer, Ind. You are married and have two children. You attended St. Joseph's College but got your B.S. degree from Indiana University and then a J.D. from Indiana University.

You served in the Air Force for 3 years, 1962 to 1965, and you practiced law from 1968 to 1972. You have been judge of the First Judicial District, Jasper County Circuit Court, since that time. Is that correct?

Judge KANNE. Yes, sir.

The CHAIRMAN. Judge Kanne, I just have a few questions here. I believe you have served on the First Judicial Circuit of Indiana for approximately 10 years, is it?

Judge KANNE. That is correct.

The CHAIRMAN. How old are you now?

Judge KANNE. Forty-three.

The CHAIRMAN. I believe this is a court of unlimited general jurisdiction, criminal and civil cases?

Judge KANNE. Yes, sir; it is.

The CHAIRMAN. You have the power of death in criminal cases?

Judge KANNE. Indiana has recently brought its statutes in line with the Supreme Court mandate and we do have the death penalty.

The CHAIRMAN. During this period you have presided over thousands of cases, and I am confident you are very knowledgeable of State laws. Do you foresee any difficulty in the transition from the State court to the Federal district court?

Judge KANNE. I do not see any insurmountable difficulties, Mr. Chairman. We use the Federal Rules of Civil Procedure in the State court system in Indiana, and I teach at the National Institute of Trial Advocacy and use the Federal Rules of Evidence in that particular endeavor. Certainly there is a difference in the law, in applying it, but I believe my background on the bench and my familiarity with those rules will make the road much easier.

The CHAIRMAN. Judge Kanne, since 1976 I believe you have been a lecturer at St. Joseph's College on the subject of constitutional law.

Judge KANNE. Yes, sir.

The CHAIRMAN. Would you very briefly give the committee your thoughts as to the extent the existence of pornography is protected by the rights outlined in the first amendment?

Judge KANNE. Sir, I do not believe there is any constitutional prohibition against restricting pornography in general. There are certainly lines that I think it appropriate for a legislative body to draw.

I have had pornography cases appear before me, and have issued restraining orders prohibiting that sort of activity. I do believe that the most abhorrent area, child pornography, is clearly within the permissibility of restraint by a legislative body.

The CHAIRMAN. Judge, would you give us your opinion about the possibility of requiring attorneys to undergo special training before being allowed to practice in Federal courts?

Judge KANNE. Mr. Chairman, that is one area in which I have, I suppose, changed my mind several times and not come to any definite conclusion. The Indiana Bar Association recently addressed the similar question of mandatory continuing legal education for the right to practice. Prior to listening to the debate on that issue, I thought it was probably a good idea and should be carried out. Now I am not so sure and, Mr. Chairman, I really do not have a firm opinion. I think there are arguments both ways.

The CHAIRMAN. Judge, there are serious problems in some prisons, particularly from the standpoint of overcrowding and effective rehabilitation. The Attorney General's Task Force on Violent Crime recently suggested that there should be an increase in the number of jail cells available to incarcerate persons convicted of violent crimes.

Could you give us your views on this suggestion, as well as any recommendations you might have regarding prison reform?

Judge KANNE. Mr. Chairman, I would wholeheartedly support that position on increased space for persons who have committed violent crime. One of the main concerns is ineffective rehabilitative programs which I feel in some cases send convicted felons, those convicted of violent crimes, on the street entirely too soon, much sooner than perhaps the sentencing judge may have anticipated. I think one of the ways to correct it is to provide humane space for prisoners, and I would support the proposition to make more space available.

The CHAIRMAN. Judge Kanne, are there ever any circumstances where you would consider it appropriate to decide a case on some basis other than one where the intent of the framers of legislation or constitutional provisions can be detected, either through the text of a provision or its surrounding legislative history?

Judge KANNE. No, Mr. Chairman, I do not. I think I would follow along with Professor Bork's comments on that. It is the job of the courts to resolve disputes and not to act as a superlegislature.

The CHAIRMAN. Is there anything else you would like to say?

Judge KANNE. No, sir.

The CHAIRMAN. Senator, do you have any questions?

Senator GRASSLEY. No, Mr. Chairman.

The CHAIRMAN. If you would like to take your seat back there now, feel free to do so, Judge Kanne.

Judge KANNE. Thank you, Mr. Chairman.

TESTIMONY OF JUDGE JAMES T. MOODY OF INDIANA, NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF INDIANA

The CHAIRMAN. Judge Moody, I believe you were born in La Center, Ky. You are married and have four children. Would you like to introduce any of the members of your family who are present?

Judge MOODY. I have with me today my wife, Kay, who is sitting behind me. I would like to introduce her.

The CHAIRMAN. You attended Purdue University but graduated from Indiana University with an A.B. degree, I believe, and an LL. B. degree from the same university.

Judge MOODY. That is correct, Mr. Chairman.

The CHAIRMAN. You have practiced law since you were admitted to the bar in 1963, until you became a superior court judge. Is that correct?

Judge MOODY. That is correct.

The CHAIRMAN. City attorney, was that a full-time position or a part-time?

Judge MOODY. The city attorney position was a part-time appointment.

The CHAIRMAN. Part-time. You have been on the bench now about 7 years, have you?

Judge MOODY. I was on the State court bench approximately 7 years. I have been a U.S. magistrate for about 2½ years.

The CHAIRMAN. You are now a magistrate, a Federal magistrate, in the Northern District of Indiana?

Judge MOODY. Yes, sir. Right.

The CHAIRMAN. Judge Moody, you have served as a superior court judge for 6 years and you are now U.S. Magistrate for the Northern District of Indiana. With this judicial experience, will you tell the committee your views on what steps can be taken to reduce the backlog of cases before the Federal courts?

Judge MOODY. Yes, Mr. Chairman.

I come from a district which happens to be burdened with probably one of the largest backlogs of civil cases in the Nation. We were a court of one judge and there were approximately 1,200 cases pending, ready for trial. Unfortunately we have had some illnesses and a death of our district judge.

There are some things that one can do to reduce that backlog. One is, of course, to get two judges working it with a full-time magistrate, proper use of law clerks and the magistrate, and also taking control of your own cases in pretrial proceedings. I think all of those combined could effectively reduce that backlog, with a lot of hard work, I might add.

The CHAIRMAN. Judge Moody, do you believe changes in the law should be reserved to the legislature whose members can be altered by the voters if the elected officials fail to reflect the values of society?

Judge MOODY. Mr. Chairman, I agree with that statement. I think the function of a judge, especially on the district court level, is to try lawsuits on a case-by-case basis and leave the legislative work and the executive work to those separate branches of Government.

The CHAIRMAN. Judge Moody, I consider judicial temperament to be a prerequisite for a Federal judge. Could you please give me your thoughts on this subject?

Judge MOODY. I agree with that statement. I think it ranks right up there with personal integrity, honesty and the ability to work hard. I think that encompasses a lot of patience that a judge must have when dealing with lawyers and litigants, and I would agree with that.

The CHAIRMAN. I have witnessed some judges who would become fractious or nervous and lose their temper, and embarrass lawyers and witnesses and others in the courtroom, too, and to me it is inexcusable.

Judge MOODY. I would agree with that 100 percent.

The CHAIRMAN. Judge Moody, would you give us your views on penalties that should be imposed for second- and third-time drug violators?

Judge MOODY. I am not that familiar with the Federal felony code, at this stage anyway. I have been handling misdemeanors. However, I think that there is a provision which would allow for an enhanced penalty if you have repeaters, and that would be an alternative that one would have to look at depending on the case that is before you. You have to tailor the sentence—which is one of the hardest things that a judge has to do, sentencing—tailor it for the individual that is before you but I would certainly consider enhancing the penalty for a second- or third-time violator.

The CHAIRMAN. The drug situation in this country has become very serious, and I really feel that judges have to crack down on these drug violators, especially the big people who bring in these

drugs and those who distribute these drugs. They are literally destroying the lives of a lot of young people, as well as some older people. You would not be soft-hearted in sentencing those people, would you?

Judge MOODY. No, sir; I would not.

The CHAIRMAN. Judge, what are the standards that you would use in deciding that your court had a continuing administrative responsibility to oversee the implementation of one of its orders?

Judge MOODY. You are talking about a continuing order that would apply to another system, such as a school system or something of that nature, if I understand the question properly. I think that should be avoided and left to those who are operating those particular systems.

There are methods such as, if you have a continuing order on an injunction or something of that nature, you do have enforcement powers through contempt proceedings and things of that nature, which one should rarely use, but that is an ultimate remedy available for a judge to enforce his order. However, I think if you have a continuing order in a school system, those types of things should be avoided and we should allow those systems to operate independently of the judiciary.

The CHAIRMAN. What is your feeling about judicial activism, or imperialism, as Mr. Bork called it? Do you feel that judges should restrict themselves to the powers they have, and not attempt to legislate and go beyond the judicial power?

Judge MOODY. I agree with that. I think a court or a judge is ill-equipped to legislate or be, as Judge Kanne said, a superlegislature. I think he should not impose his own personal beliefs on the system. We are duty bound to follow the law as we find it to be in each particular case.

The CHAIRMAN. Some judges have taken over the running of school districts and making all kinds of decrees, even trying to impose taxes. I hope you are not of that philosophy.

Judge MOODY. I am not of that philosophy, and I will not be.

The CHAIRMAN. Senator Simpson, do you have any questions?

Senator SIMPSON. No, Mr. Chairman, thank you.

The CHAIRMAN. Senator Grassley.

Senator GRASSLEY. No, Mr. Chairman.

The CHAIRMAN. Judge Moody, we are glad to have you with us and we wish you good luck on the bench.

Judge MOODY. Mr. Chairman, thank you. I would like to thank my two Senators, Senator Lugar and Senator Quayle, for supporting my candidacy here and being here today to speak such kind words. I also would thank you and your staff for the courtesy and the kindness you have given us, and President Reagan for nominating me to this position. Thank you very much.

The CHAIRMAN. Well, they are very fine Senators and very fine men.

Judge MOODY. I agree wholeheartedly. Thank you.

The CHAIRMAN. Our next nominee is Mr. Alan C. Nelson of California to be Commissioner of the Immigration and Naturalization Service.

Mr. Nelson, if you will come around, hold up your hand and be sworn.

Do you swear that the testimony you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. NELSON. I do.

The CHAIRMAN. Mr. Nelson, do you have any of your family here you would like to introduce?

Mr. NELSON. Yes, Mr. Chairman. I would like to introduce my wife JoAnn and my daughters Kathy and Karin.

Senator SIMPSON. Mr. Chairman.

The CHAIRMAN. Senator Simpson has a statement he would like to make at this time.

STATEMENT OF HON. ALAN K. SIMPSON, A U.S. SENATOR FROM THE STATE OF WYOMING

Senator SIMPSON. Mr. Chairman, you are very kind. I just wanted to take a moment. It is such a pleasure to participate and make a very brief statement. I want to thank you for the support that you have given to the Subcommittee on Immigration and Refugee Policy. Without your continual efforts, continual support, continual counsel, and assistance, we would not be embarked upon our cause as we are.

I just want to express my very great pleasure that the Reagan administration has nominated Alan Nelson to serve as Commissioner of the Immigration and Naturalization Service. That office has been vacant since 1979, in September, precisely during the period of time when immigration has come to the very front burner as a national and domestic policy issue.

If the comprehensive immigration reforms which are supported by members of this committee and the subcommittee as well as by the Reagan administration are going to be carried out in an efficient and humane manner, there must be, has to be, a top-notch manager at the head of the INS. I think you are that person.

Mr. Chairman, I believe that Alan Nelson is the right person at the right time to fill that role. He has become well-grounded and articulate on many complex areas of immigration law and policy in a very short time that he has been in Washington. I have had personal visits with him. He has already testified for the INS at four of the subcommittee's hearings on immigration reform. He has been most cooperative with members of the subcommittee in providing information and very candidly discussing the controversial and nettlesome subjects in this area, and we do find a few, I can assure you.

In an agency, too, that has been continuously characterized by poor morale, I have found that many career INS employees are truly heartened by the prospect of Mr. Nelson's confirmation as Commissioner; so I say to you, sir, that Alan Nelson has already demonstrated his capabilities as a manager.

He brings to the Immigration and Naturalization Service this managerial expertise, and a deep desire to modernize the agency's antiquated ways of doing business. He has a caring demeanor, a listening ear, and an unflagging conviction that immigration policies must be reformed and then fully implemented in a human and nondiscriminatory manner.

I heartily endorse his speedy confirmation as Commissioner of the INS. I think this country really needs him in this position at this time, and he is ready for the task.

I thank you, Mr. Chairman.

The CHAIRMAN. I want to thank you, Senator Simpson, and I also want to commend you for the outstanding leadership that you have provided to the Subcommittee on Immigration. I do not know of any chairman of a subcommittee who has worked more zealously and more capably. We are very proud to have you on the full Judiciary Committee, and especially proud to have you in charge of that Immigration Subcommittee.

Senator SIMPSON. It is a mutual feeling, Mr. Chairman. Thank you.

TESTIMONY OF ALAN C. NELSON OF CALIFORNIA, NOMINEE, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE

The CHAIRMAN. Now, Mr. Nelson, I believe you were born in California.

Mr. NELSON. Yes, sir.

The CHAIRMAN. You are married and have three children. You attended the University of California and received a B.S. degree and a J.D. degree. Since then you have practiced law and served with the State of California, and also with the Pacific Telephone & Telegraph Co. out there. Is that correct?

Mr. NELSON. That is correct, Mr. Chairman.

The CHAIRMAN. Since 1981 up until now you have been acting as the Deputy Commissioner of the Immigration Service.

Mr. NELSON. That is also correct, Mr. Chairman.

The CHAIRMAN. Is there anything you want to say especially?

Mr. NELSON. I have some very brief remarks, Mr. Chairman. After Senator Simpson's very kind remarks, it is hard to follow that, and I do appreciate them from Senator Simpson and from the committee. I certainly also want to thank the President of the United States for formally nominating me and the Attorney General for sending my name forward, and you, Mr. Chairman, and Senator Simpson for this committee's and the subcommittee's support.

I will touch very briefly on three major areas which I think were included in Senator Simpson's remarks. I see three major thrusts in the Immigration Service that we must move forward on: There are management issues, there are overall policy issues, and there are legislative issues.

Let me deal with the last first. On the legislative issues, as you have said, Mr. Chairman, Senator Simpson's efforts in the subcommittee and this committee's efforts are unprecedented in the number of hearings, the hard work that has gone into it. Similar efforts by Chairman Mazzoli and Chairman Rodino in the House, I think, can lead, along with the administration, to some very comprehensive immigration reform legislation.

On behalf of the administration, I am certainly stating our commitment to work closely with this committee and with Senator Simpson and with the House to reach that goal which is so important for us at this time, with the work and the effort that have gone into it. We are committed in that area and that is essential to

give America, I think, a secure immigration reform system that we need.

The second area is in policy. I think because of the lack of permanent leadership in INS and many other problems, external and internal, there is a need to reassert INS and the Department of Justice in the leadership role in immigration policy. I have met a great deal and coordinated with other agencies of this Government, met with most of the various interest groups of all kinds dealing with immigration matters, and certainly am committed to a continued open dialog so we can move forward in this nationwide policy area.

As to management, INS certainly has and has had problems. I think, as Senator Simpson pointed out, it is a mixture. There have been some morale problems internally. There have been some management problems. We need to work toward a balanced, fair, deliberate system to improve the existing management deficiencies, to raise the morale of the employees, and to utilize the many very talented people that there are there. I am convinced that with, again, the support of the committee, we can move forward effectively in that area.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Nelson, based upon your present knowledge of the Immigration and Naturalization Service, can you tell us what you perceive as the major policy and management issues in the coming year?

Mr. NELSON. I think very largely, Mr. Chairman, I might have touched on that in my introductory remarks. Certainly in the policy area, as I say, we need to reassert some real leadership and direction there, both legislatively and administratively.

In the management area, we have brought some new people in, we are consolidating procedures. The stability, of course, is an important thing. As Senator Simpson pointed out, it has been 2½ years since there has been a permanent Commissioner. We need to establish some solid management procedures, which are underway and which we expect to elaborate on, improve data processing, modernize the Immigration Service.

There are tremendous external problems with the number of immigrants, the number of illegal aliens, and I think we are on the path—we have a lot of work to do, certainly—but we are on the path to some very significant changes that will enable us to do a job for the American people.

The CHAIRMAN. Mr. Nelson, the Immigration and Naturalization Service has been criticized in the past for its poor record of management. What specific plans do you have to address this problem and what is your timetable for carrying out these plans?

Mr. NELSON. When I became Acting Commissioner we selected a group from inside and outside to make a comprehensive review in a short timeframe of a number of organizational and management and communications matters. I expect their report approximately the end of February and we expect to take some actions from that.

There are a number of things going on and a lot have gone on for a while. I think at this time it would be quite appropriate to compliment Doris Meissner, who has been Acting Commissioner, appointed by Attorney General Smith in May, and who served in

that position for 8 months. Under her leadership a lot of things have been started. We will continue those—effective data processing programs, other management systems—so that we can deal with the backlog, better serve the clientele, and also have a better and more effective enforcement program at the borders and in the interior.

The CHAIRMAN. Do you have a record, do you think, of all immigrants and where they are?

Mr. NELSON. No, sir, we do not. I do not know whether that is fully possible with the number of people coming into the United States but we can certainly do a much better job. We are currently working on a nonimmigrant control procedure that will have the ability to have much better controls over those coming in and those going out. I think some of the other matters that are before the committee now as legislation can also give us a better control on both the legal and the illegal aliens, but it is a massive job.

The CHAIRMAN. Senator Simpson is working on an immigration bill now. I guess it will probably come forward to the full committee before too long.

Senator SIMPSON. Indeed it will, Mr. Chairman.

The CHAIRMAN. Have you had a chance to testify on that bill?

Mr. NELSON. Yes, Mr. Chairman, I have testified numerous times as the Senator mentioned. I know we are getting close to the end of that hearing process. We have appreciated, the administration, the opportunity that Senator Simpson has afforded by the active work of his subcommittee and their staff to move forward with the study of immigration problems. We look forward to the process of analyzing legislation and working very closely with this committee toward passage of some immigration reform.

The CHAIRMAN. I wish you would work very closely with that subcommittee because that will be one of the major accomplishments of this session, in my judgment, Senator Simpson, that piece of legislation. I know the time and attention you have given to it.

Mr. Nelson, anything that he calls upon you to cooperate on, I am sure you will do it.

Mr. NELSON. We certainly will do that, Mr. Chairman.

The CHAIRMAN. Mr. Nelson, what is the status of the Immigration and Naturalization Service's long-term automatic data processing plan? Do you expect implementation during this fiscal year?

Mr. NELSON. We are moving forward, Mr. Chairman. That is something that has been in the mill for a number of years. There has been criticism of the Immigration Service for not having a modernized data processing system. Congressional committees, the GAO, GSA, the Justice Department, OMB, and many other agencies have been critical.

There has been work going on for a significant period of time, certainly before I arrived, to get a system. Part of the problem is to be sure it is done right, not just a big system, but to be sure it is a workable system. A lot of good work has been done and a conceptual proposal has been developed. They have reviewed it with many of those groups that I have mentioned and have received their general endorsement.

I have reviewed it in concept and have approved it, to allow it to now go forward to the Justice Department and to OMB, so we do

see that a long-term data processing system is underway. There is an interim system that, in effect, gets this matter rolling. Again, procedures are underway for that. We do expect in this fiscal year to see the beginning of this program but of course it will be many years before it is fully in place. However, we do think we have built a firm foundation that will go forward to the end result we all need.

The CHAIRMAN. Mr. Nelson, would you describe the Immigration and Naturalization Service detention policy and other administrative efforts to control illegal immigration?

Mr. NELSON. Yes, Mr. Chairman.

Actually the law basically requires detention for those people who are subject to exclusion. In the past, very often that law has not really been carried out. This administration, starting in the spring or summer, reaffirmed that there would be a detention policy for those arriving illegally.

This is particularly focused in Florida where the major incursion exists. At the Mexican border, people that are detained normally voluntarily return very quickly, so it is a different type of problem. That has been going on for many years but it is a different situation with those arriving in Florida, and particularly the many that are claiming asylum. We have had a problem in the past where they have not been detained and they fade into the community and there is no real opportunity to come back up with them and determine whether they are entitled to be here or not.

Therefore, the Reagan administration has implemented a detention policy. We think it has worked very effectively. In the last 3 months of 1981 there were approximately 400 illegal Haitians apprehended in Florida compared to about 4,000 in a similar period 1 year earlier. We believe, therefore, that the detention policy together with interdiction and effective court approaches that we are pursuing in Florida are beginning to turn it around to where we can have an effective deterrent to illegal immigration.

The CHAIRMAN. Mr. Nelson, as you know from the heavy schedule of hearings undertaken by the Subcommittee on Immigration and Refugee Policy, which is chaired by the able Senator here from Wyoming, Senator Simpson, there has been some debate about certain items in the administration's proposed legislation. For example, there is an employee sanctions law without an employee identification system.

Will you continue to be available to work with members of the subcommittee on such matters as this?

Mr. NELSON. Absolutely, Mr. Chairman. You have my full support and guarantee of that. As stated earlier, we look forward to working closely with Senator Simpson, the Immigration Subcommittee, and your full committee to move forward to obtain immigration reform.

The CHAIRMAN. As much as your Service and the subcommittee can reach consensus, of course, the better, and the quicker we can get matters attended to.

Mr. Nelson, most people who apply for immigration benefits are entitled to them. However, there is a great deal of fraud involved with aliens who are not entitled to benefits. What plans, if any, do

you have to increase the detection of fraudulent applications without slowing down delivery of benefits to those so entitled?

Mr. NELSON. That is an ongoing problem, Mr. Chairman, and again not easy of solution. However, we do believe through our enforcement efforts that have been going on and that are coming along, that we are going to improve much in that area. We have a number of cards that we have developed. We have a very good forensic lab that is looking into better ways of detecting fraudulent documents.

It is not going to be easy of solution, certainly, and again I think some management organization and management improvement can enable us to do a more effective job in that area. We certainly will make every effort to do so.

The CHAIRMAN. Mr. Nelson, is the lack of money to detain and transport aliens in effect determining the Immigration and Naturalization Service's enforcement policy, or just what relation does it have?

Mr. NELSON. I do not think so, Mr. Chairman. I think in the past that had been somewhat of a problem. Again through the efforts of Senator Simpson and others, I think, some of the budget amendments that INS has received, we have been and will be able to do a great deal in that area. Of course, money is always a problem but we think we have some tools to do a great deal.

We are committed to an effective detention and deterrent policy as to illegal immigration. We think both with the resources and continued support of Congress and the administration—I think that the fact that the Reagan administration and certainly the Attorney General have focused on immigration, as has this committee, as a very major item—will go a long way to be sure that we are doing the things necessary.

The CHAIRMAN. Mr. Nelson, do you believe the comptroller concept utilized by the INS this past year has improved the budget and accounting procedures?

Mr. NELSON. Mr. Chairman, as I understand it, I think we have started out—again, going back a year or so—and I think it needs to be worked on more but I think we are making progress to be sure we have an effective long-term plan, mission plan of the agency, to be sure that everyone knows where we are going, how we are going to get there, and to integrate the data processing and the budgeting type of programs into that. I think that we are on our way to that. We need to do some more but I think we are on the way.

The CHAIRMAN. Mr. Nelson, do you think that the Immigration and Naturalization Service's antismuggling unit should continue to function at the district level, or should it be combined with either the Border Patrol or Investigations Division?

Mr. NELSON. I am really not in a position to probably give you a full opinion on it. Certainly the antismuggling activity, Mr. Chairman, is a very important part. I have had a chance to visit some of our operations in that regard. No question, there are some organized rings and some very active businesses that are in the smuggling operation. We have to be smarter than they are and to utilize various effective and innovative approaches.

I think we are doing that in a number of areas. We are doing it in litigation and I think we will be doing it in investigations. The

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exact location organizationally of antismuggling I think is something we do need to pursue.

The CHAIRMAN. Thank you very much.

Senator Simpson, could you finish this hearing? I have to go to another meeting.

Senator SIMPSON. I will, sir.

The CHAIRMAN. I will turn the hearing over now to Senator Simpson, who will continue the hearing. Thank you very much for your appearance here, and I wish you well in your work. I realize you have a big responsibility.

I would just like to ask you this one question before departing: Are you having any trouble now with any more illegal Cubans or Haitians coming in here?

Mr. NELSON. Well, it is a continuing problem, Mr. Chairman. As I mentioned with the Haitians, I think in the last 6 months that we have seen some very significant progress due to the administration's position. We hope that the message is that if people want to come to the United States they should do so through legal grounds and that that message is getting through.

I am sure we will continue to see some influx. Hopefully it will be reduced. There has not been a great deal of influx of Cubans. We do have some issues and problems arising there, and we have of course a great number of Cubans that are here in the United States as a result of the Mariel boatlift in 1980 that we are still having to deal with, many of whom have been integrated into the community; but we still have a number of the criminal element and some of the mentally ill people that we have to continue to detain.

The CHAIRMAN. Are you working on any plans concerning them, maybe to arrange for them to be deported?

Mr. NELSON. We would very much like to, Mr. Chairman. One of the problems there, of course, is the Cuban Government not being willing to take them back. We have had discussions with the State Department. That is an ongoing type of issue and we are certainly making every effort internally to do what we can but unfortunately, many of those criminal elements of course are not ones that any country voluntarily wants to take. This has created a big problem for us.

The CHAIRMAN. Suppose you saw a boatload of Cubans or Haitians coming this way. How would you handle it?

Mr. NELSON. Mr. Chairman, as you know the President announced in September of 1981 that we would interdict vessels coming with undocumented aliens. That program has operated since early October 1981 and it continues. We believe it has been a very effective piece of the administration's action in deterring illegal immigration.

There have been several interdictions. Boats have been returned back to Haiti. There are asylum officers on board these vessels so that if people do claim asylum, there are procedures where that can be determined before the action is taken.

The CHAIRMAN. However, you have turned them back?

Mr. NELSON. Yes, sir.

The CHAIRMAN. It is a deterrent if they know you have that policy, too, isn't it?

Mr. NELSON. We think the deterrent aspect is very good. It has also been interesting and maybe ironic that it has been a humanitarian venture, in that on both of the occasions that the boats were turned back they were in danger of sinking and, had not the Coast Guard been on the scene, these people likely would have drowned.

The CHAIRMAN. Thank you very much.

Senator Simpson, thank you for taking over.

Senator SIMPSON. Mr. Chairman, I never dreamed when I came down to ask a few questions that I would end up chairing the hearing, but it is all right. Thank you.

Let me just take a moment to also pay my regard to the Acting Commissioner for so many months, Mrs. Doris Meisner, who did an excellent job in that interim period, and I would certainly hope that she would be very much in consideration for continued efforts in this area. She has been here through many administrations and is a true professional in that area, and I commend her.

I have several questions, if I may. In the second continuing resolution, Congress appropriated about $10 million less, in enforcement resources, that is, than had been requested by the administration in its amended budget request for fiscal year 1982. What areas of the INS enforcement effort will be most significantly affected by that reduction?

Mr. NELSON. Mr. Chairman, it was spread throughout the enforcement area: about a quarter of that, Border Patrol; close to half in the detention/deportation area; and the other quarter was in general equipment and support operations.

Senator SIMPSON. It was a little bit of a tough blow.

Mr. NELSON. It was, although I think overall, again, all agencies in Government of course have had their budget problems, and as part of the administration we recognize we have to do our fair share.

I think we have been fortunate, again largely due to your good efforts, in having some budget supplementation that has been very effective. In fact, in the enforcement arena we will be adding, particularly in the Border Patrol, some 178 positions in addition to some helicopters and new vehicles, so that we do see an opportunity to recapture some of the cuts from the past.

Senator SIMPSON. Right there you have hit upon a congressional frustration. I think Congress has been repeatedly frustrated in the attempt to upgrade the INS enforcement resources, particularly along the border, and one example is the Border Patrol. Each time we authorize and appropriate additional positions and funds to increase the Border Patrol, we find that the agency does not fill those positions and uses the resources to fund either cost-of-living increases for other agency personnel or for other general purposes.

In all fairness, I admit that that might have been directed by OMB in some cases but can you give us the assurance that this administration views immigration law enforcement as an important priority? It is one of the three significant factors of the Select Commission's report, increased enforcement at our borders and internally, and that does not mean chain link fences or a closed border. However, an important priority indeed is enforcement, and that these additional moneys and positions which Congress has appropriated for fiscal year 1982 will in fact be used for that purpose.

Mr. NELSON. That is certainly my intention, Senator. I do have a law enforcement background. I do feel the need for the enforcement. Of course, we have a broad role, service and enforcement, but there is no question, when Congress appropriates money for these positions we will do everything we can to be sure we implement them. As I mentioned, I think the fact we are planning the 178 additional Border Patrol positions, modernized vehicles and helicopters, I think is a positive indication of that fact.

Senator SIMPSON. Well, the chairman in his questioning discussed that many of the INS directors are terribly frustrated, records systems hopelessly behind the times, and you indicate that that is going to be a priority of yours to correct that situation.

Mr. NELSON. That is correct. No doubt about it, we have to modernize, we have to utilize some effective type of procedures such as profiling, some of the kind of thing that the Internal Revenue Service has utilized, and just more modern methods.

I think, again, a lot is underway and with credit to a lot of people that have worked on it. I think my biggest responsibility will be to gather together many of the existing plans and procedures, be sure they are tying together, and bring in some new ones but get things on the track and be sure they are moving forward.

Senator SIMPSON. Well, I think one area that has concerned me in my travels and in the hearings on this issue is, we find that almost half of the illegal immigrants now in the U.S. originally entered this country with legal documents. What will be done to improve nonimmigrant document control?

We know that many nonimmigrant forms are simply filed away in a cardboard box in some of the district offices, never again to see the light of day. Furthermore, the agency doesn't have any information, simple information as to when or if a nonimmigrant has left the country. I would like to know what your thoughts are as to what we would do to improve that situation and when we might expect those improvements after we assist you with appropriate legislation.

Mr. NELSON. No question, there have been backlogs, although I think there has been recognition of the problem. Efforts have been underway and are underway now to reduce that backlog, and we have had outside contractors and others so that we do see pending improvement in the existing system on backlogs.

The key, again, is to modernize. We are, and have under development currently a nonimmigrant system to deal with the type that you are talking about. We expect to start implementation of that a year from now, January 1983. We think that, together with some of the other cooperative ventures with the State Department, can start giving us the system to be effective in this area.

Senator SIMPSON. A frequent criticism in the past is that the INS merely responds to crisis situations rather than giving any attention to long-range planning which would preclude those crises. In response to a congressional mandate in 1980, the agency adopted goals and strategies which it called a mission plan. That mission plan does address alternate ways for the agency to accomplish its priorities. Have you reviewed that mission plan? If so, to what extent will you direct the agency to move in accordance with those principles in that plan?

Mr. NELSON. I have reviewed the mission plan, Senator Simpson, and overall I think it is well-done. There are some areas we need to modify and reevaluate but in most areas, particularly in the management improvement area, there are some sound principles.

I think the key to any mission plan is to be sure that you adopt those things for short term that you can move on short term; adopt those long term that you will move on long term; establish timetables; establish goals and objectives, assignments, and evaluation and followup.

I am committed to a management by objectives type of approach. We will implement that, and as far as the mission plan, again, some of this is underway and some have been accomplished. Others are being worked on but we will shortly, in addition to what is going on already, make a clear policy determination on those we will be moving on and set forth these types of timetables.

Also, again, the overall planning process ties into this. I think, as I mentioned earlier, some of the strategic planning efforts in the ADP area and budget are attempting to focus the resources, so there has been a lot of work done. I think my job is going to be to collate, to be sure we tie this system together and have accountability and move forward. I am committed to do that.

Senator SIMPSON. Along that line, the President's Management Improvement Council appointed a task force which was headed up by John Kratzke. You and I have discussed that before. That was a complete review of INS management, and they issued their comprehensive report last year with many recommendations. Will you be following those recommendations?

Mr. NELSON. Again, I have reviewed that report. It was well done, a lot of good work and a lot of review. Again, many are underway; some have been completed. I will try to follow the same process to be sure that we have determined which of those recommendations will be adopted after analysis and debate. Again, many are underway. Most of them, I think, to answer your basic question, are sound and we can go forward with them but we will determine which ones we will formally adopt and use and then establish this same type of evaluation and followup process with them.

I might mention, similarly with the Select Commission I think that there was a lot of work that went into that, as you well know from your efforts on that commission, and we ought to be sure—and we are moving in that direction—to have a similar list of the recommendations, determine which ones we can and should proceed with, reject the others if they are not feasible or desirable, and have a list and go forward in an expeditious fashion.

Senator SIMPSON. Just a couple more questions: I remember the hearings with Mr. Kratzke's presentations, and many of those seemed very realistic and attainable. I think that they were quite helpful.

However, another of INS's problems has been the lack of stability and continuity in the agency's top management. I hope that your confirmation and your performance as Commissioner will do much to alleviate that instability; yet in looking at an organizational chart for the INS—which is certainly a curious document indeed—I find that many of the top management positions are

either vacant or have acting managers. How long would you anticipate it will take you to get your team assembled?

Mr. NELSON. First of all, as to your earlier comment, certainly I hope it is true for a variety of reasons that the new Commissioner, if that be me, will give the stability that is so necessary. Any organization for 2½ years without a permanent head obviously has a lot of problems. I think, as you have complimented Ms. Meisner, that she has done an outstanding job in a difficult situation.

I think that is the key. Very often vacancies beget more vacancies in acting positions. I think now that we will have a permanent commissioner, that already we are moving forward in this area. Of the vacancies that we have in the top positions, we have brought in several new people: Mr. Inman, our new General Counsel, and Mr. Salgado, our new Associate Commissioner for Enforcement, are now on board. We have several other new positions coming.

We have, as I say, a number of very able people. For those that are in acting positions, we will move rapidly to determine who should be in that position. I have instituted a procedure where I am personally, along with the Deputy Commissioner, interviewing the top several candidates for each of the positions, the top positions, so that I get to know them and they to know me. Of course, that takes a little time but I think it is very important to do that and we are moving forward. We have, I think, six district director positions, and we have started that process already. I would hope within, I would say, several months, we should have filled most of those top positions with permanent people. I will certainly move forward to continue that.

Senator SIMPSON. Well, that is helpful. There are many things about the organizational structure which have surprised me in the hearing work, such as the district office that handles New York City is in Burlington, Vt., and other curious and even more extraordinary organizational things which I think need attention, at least to see if that is a functional process.

Mr. NELSON. I might add on that, Mr. Chairman, as I think I said earlier, I did appoint a group to look at a number of the organizational considerations—management relationships, information, the situation with the central office and the communication system—with the idea that they should report back no later than the end of February.

With the present management improvement report, other evaluations, we have a lot of material out there and I do not think it is something we want to take a long time studying today. There is a lot there. Collate that and then make some of these basic decisions; try to make some simplifications and improvements. I think we can make some good progress quickly to get the stability going that you have mentioned.

Senator SIMPSON. Well, you have expressed to me that that is one of your important priorities, the communications issue, and the INS has suffered greatly from a lack of communication. I would like your thoughts that you have shared with me as to what you intend to do with the regions and the districts and the sectors, and how to make that more functional and productive.

A final one, then: Senator Thurmond talked about detention. I hope that we can alleviate part of those problems by addressing the

streamlining of the asylum procedures, and I think that we have had enough hearings to suggest that that could be done without any elimination of due process. In fact, it is so bogged down now because there are five layers of hearings in the asylum procedures; perhaps more due process than comes to any citizen, natural or native.

Therefore, we will pursue that but in this discussion of detention facilities, now, you have made this move of certain persons from Chaffee. How has that worked?

Mr. NELSON. I might comment, Mr. Chairman, on your earlier comments. I would fully concur with what you said on the asylum process. I think the legislation that is being considered is an essential thing. I think what we are trying to do now, without it, we are trying to move the hearing process. The Attorney General through his efforts, has made efforts to get counsel for detainees which counsel normally representing them have not done because the delay has been to their benefit. Therefore, what we can do administratively and what we can do with the help of the Congress in effective legislation is essential.

As to the detention itself, on the Chaffee matter, just last week or a few days ago, I guess early this week, the Cubans that are generally in the category of mentally ill and various criminal offenders have been moved from Fort Chaffee, Ark., pursuant to various commitments that had been made to close that facility, to several Bureau of Prisons facilities; the facility in Atlanta and the mental facility at Springfield, Mo. That has now been completed. They have been moved, and we think that is effective.

First of all, it takes care of the Chaffee problem. Second, being in other facilities, certainly the Cubans there are encompassed in the class action existent in Atlanta. Those that are able to be rehabilitated and sponsored out of course will be. Some of the others might not but they will then be detained.

Senator SIMPSON. Thank you very much, Mr. Nelson.

Let me recognize now Senator Grassley from Iowa, who has been a very, very helpful and interested member of the subcommittee which I chair. He has been of great assistance. He has attended many, many of the hearings and participated fully, and I am most appreciative.

Senator GRASSLEY. Thank you, Mr. Chairman.

You have been appointed to one of the two positions which I consider the most difficult to accomplish goals set out for you in the Federal Government. The other one happens to be the Secretary of Agriculture. However, if you are successful in stemming the flow of illegal immigrants into this country, you should be a hero shortly, but I do think, as you have already found out, it is a difficult task. Part of the problem is due to an outdated law. We are in the process of reforming it and hopefully we will get the job done.

My first question is in regard to judicial decisions affecting immigration law. It is my understanding that when a judge in a certain area of the country renders a decision on a case concerning an immigration law violation, that the INS sometimes interprets that ruling and issues an instruction on a nationwide basis. Then at other times this is not done, and the judge's ruling remains appli-

cable only in a certain area, presumably the State or the appeal region.

What will be INS's policy in this area under your leadership?

Mr. NELSON. Well, certainly, Senator Grassley, I think you have identified a question of consistency and I think that is the important underlying issue, that whether it be in a legal decision or implementation of that or in management things, it is important that there be consistency. I am pledged to work with that. I think the legal issue you talk about—I guess somewhat it depends on the type of decision and whether it is the kind of thing that should be made a nationwide policy or whether it should be limited. I could see both occurring.

As I mentioned, Mr. Inman, the new General Counsel, will, I think, be very effective in working in this area, certainly making the conscious decision as to the effect and impact of such a court decision and how we ought to handle it. Certainly also I think we are establishing a more effective legal operation, INS itself, in conjunction with the other elements of the Justice Department, to be sure we are getting our fair day in court and taking, you might say, offensive—hopefully not in the wrong sense of that word but in the right one—offensive efforts to be more effective in the courts. I think we are making good progress there.

Senator GRASSLEY. You see it, then, only from the standpoint of how your department is represented in the courts as opposed to how the court cases are applied either nationwide or regionally.

Mr. NELSON. No, no. I think both; I did go a little beyond your question, possibly, but certainly we want to be sure we are having very effective representation in court so we are getting the kind of results which we think are appropriate. We do not want to lose by default, and in the past that has happened, so I think that is one element.

Certainly to the extent that you have a court decision, we would likewise decide about the appropriate appeal remedy if we were on the losing side or whatever. If a decision is final, I think it is very essential that we make the conscious decision: Is this a precedent decision that should be a nationwide policy or is it a fairly unique situation that should be intentionally left on a local level, so that we do not have to apply if we think it is a bad one.

However, I think the key thing, certainly, is that we make very analytical and conscious approaches to these matters.

Senator GRASSLEY. This is an area you will be giving some attention?

Mr. NELSON. Yes, sir.

Senator GRASSLEY. Recently I was down with Senator Simpson to Texas, and I spent some time in the El Paso sector. I had an opportunity to tour that area. You could see the illegal immigrants coming in through the fence. Those people are usually returned, if they go back voluntarily, and that is the usual procedure unless there is some other violation of law.

Other times these people return to this country, even within that same 24-hour period of time. Do you have any proposals to improve this situation?

Mr. NELSON. It is a difficult area, Senator, certainly. I think there are two areas: The one is more effective border enforcement.

There is always a need but, as we know, with the length of border we have, land and sea, there is no way you are going to keep people from coming across if they are determined to do so.

However, we do have some very effective modern techniques—sensors, infrared devices, the vehicles and helicopters I talked about—and we can do a better job. We have some dedicated border patrol and other people out there, likewise the antismuggling operation, the investigations. We have recently done some very effective investigation where we tracked down some IRA terrorists and others, so there are a lot of efforts we can make but there is no way you can stop them entirely.

I think the other key element is one of the elements of the legislation, and I know Senator Simpson supports it—employer sanctions. You must do something to demagnetize the draw of people to come into the United States, and that is jobs. If we can have an effective employer sanctions program, that together with more effective enforcement, will do the maximum that I think can be done in this area.

Senator GRASSLEY. Since you have been on the job, have you had an opportunity to influence the President's immigration recommendations so that they might be changed to any extent.

Mr. NELSON. Not really, in that, as you mentioned, they were formally announced, I think, on July 30, and the work on the bill was ongoing. I arrived on September 8 and the bill was nearly drafted at that time, so I was not involved in the deliberations or in the drafting process.

However, I can say, certainly very sincerely, that I think the work that went in from the Attorney General's leadership, the Cabinet Council's, the debate that went on on all elements of this bill, and, of course, the background of the Select Commission before that, that they came up with a very balanced and solid program. I have been asked before whether I have any problems with the bill, and I do not. I think it is a very solid bill.

Again, working with Senator Simpson and the subcommittee and similarly in the House, there has been a lot of testimony, a lot of debate. I think we are entering a period now when the testimony is concluded, where there can be some honest discussion of these issues, the differences, and we can come out with a very comprehensive reform bill that I think will meet the needs of the Congress and the administration.

Senator GRASSLEY. Therefore, now that you have reviewed the recommendations, then, if you had been involved with them prior to July 30 they would have been about the same as these?

Mr. NELSON. I would think so.

Senator GRASSLEY. One other comment in regard to your comment about the creation of jobs in Mexico to solve the problem: Do not forget that the effort toward twin plants was to do that but it has had the impact, at least in my understanding, of bringing people further from the interior of Mexico so that there are a larger number of people on the border and further pressure to emigrate to our country.

I would like to now bring up the subject of your agency's cooperation with local law enforcement agencies, and ask to what extent local enforcement units currently are employed in INS operations.

Do you propose to increase active involvement between local police and INS personnel?

Mr. NELSON. That is an excellent question, Senator Grassley, and one that I have not had a chance to be deeply involved with. However, I was somewhat surprised to learn as I was getting my baptism and getting around to some of our offices, that apparently there is not a great deal of work between local law enforcement and INS. This may be varied. Some local law enforcement agencies might not be terribly interested or desirous of working with the Immigration Service but a lot of others are. It seems to vary depending on areas and also, of course, as is often the case, personal and working relationships.

Apparently there has been some policy that I believe went back into the Carter administration where local law enforcement was, in effect, asked not to be involved in immigration-type matters, and I think that ought to be rereviewed. I do not have a strong position because I do not know all the background factors but I do think that that ought to be readdressed.

Senator GRASSLEY. It is my personal belief that it would enhance the capability of the INS tremendously.

Mr. NELSON. No question about that. I have to admit from a selfish point of view that we could use more help, and that would certainly be a reason to reevaluate that former policy.

Senator GRASSLEY. It is my understanding that one of the reasons that there has been severance of the relationship goes back 10 years or so, and it was aimed at cutting down on costs from your budget that were being diverted to local law enforcement due to the local imprisonment or detention of illegal aliens. I think we ought to measure that again and find out if maybe we are not being pennywise and pound foolish.

Mr. NELSON. I agree, Senator. I think that is an excellent point. I definitely will pursue that.

Senator GRASSLEY. It seems that both the INS and the State Department's efficiency would be improved if the computer systems were linked. I just would like to know your views on it.

Mr. NELSON. Absolutely, and we have had several—our staffs have been working closely with State and Customs to be sure that our mutual systems are integrated. I attended a meeting—actually Chairman Mazzoli of the House Subcommittee on Immigration convened it—and it was a catalyst.

We have met further with the State Department. I have been personally involved on several occasions, and I can certainly say that efforts from Customs, State, and INS are going forward to do everything possible. I think there is a firm commitment by all three of us to be sure we are tracking. I expect that that will——

Senator GRASSLEY. OK, but is tracking the same as total cooperation, total linkage?

Mr. NELSON. Yes; I meant it in that sense.

Senator GRASSLEY. Good.

Mr. NELSON. I am not a technician in the computer area, but certainly to be sure that whatever systems we have are fully compatible and integrated or whatever so that definitely you are all tied together.

Senator GRASSLEY. However, you feel that a decision has been made to move ahead with this linkage. Is that right? Has it reached that stage?

Mr. NELSON. A conceptual decision, anyway.

Senator GRASSLEY. OK.

Mr. NELSON. I am not sure. I think we are all still developing but I think the conceptual——

Senator GRASSLEY. I hope we are not involved with any turf battles between departments and that sort of thing that is going to hold up maximum use of computers and maximum cooperation for an obviously worthy goal down the road.

Mr. NELSON. In that area, Senator Grassley, everything I have seen personally indicates that there does not seem to be any turf problem in that area of computer tie-together, linkage, and there is a commitment, as I say, to be sure we are properly linked.

Senator GRASSLEY. Well, good luck.

Senator SIMPSON. Thank you very much, Senator Grassley.

Indeed, I have a feeling, I hope not a naive one, that Justice and State are working closely on this area, getting to know the people involved, and I see no reason why that will not continue, hopefully. It has to be, indeed.

I thank you for your presentation. It has been very helpful. I am pleased to see your family here, your wife JoAnn and daughters here with you on this significant day. Thank you very much. Good luck. Grab a tight rein and come out of chute No. 4. Here you go.

Mr. NELSON. Thank you, Mr. Chairman. I will follow that advice. [Laughter.]

Senator SIMPSON. Yes, sir.

I do have some questions that I will present to you, Mr. Nelson, from Senator Kennedy who is the ranking member of this subcommittee, who has been most helpful and has been of great assistance throughout the long process. You can direct the answers to those questions in writing.

Mr. NELSON. All right. Thank you.

[Subsequent to the hearing Mr. Nelson submitted the following material:]

Responses of Alan C. Nelson to Questions of Senator Edward M. Kennedy

DETENTION OF HAITIANS

a. Q: Explain why INS policy towards the processing of Haitian asylum applicants has changed, whereby Haitians are detained rather than released to the community pending disposition of their case.

A: Section 235 (b) of the Immigration and Nationality Act directs that every alien (other than crewmen, stowaways, and security risks who are covered by separate provisions) "who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer (emphasis supplied)." Thus, detention is mandated by statute.

Assuming that such arriving aliens do not wish to withdraw their applications and depart, the only exception to detention is through an exercise of the parole authority set forth in section 212(d)(5) of the Act. That section provides that parole may be exercised in the discretion of the Attorney General, and under such conditions as he may prescribe, "for emergent reasons or reasons deemed strictly in the public interest." The legislative history of this parole provision shows a Congressional intent that parole be used in a restrictive manner and this was further emphasized by Congress through the Refugee Act of 1980, which removed the Attorney General's authority to parole groups of aliens as refugees.

Prior to 1977, virtually all undocumented Haitian arrivals were detained based on the clear statement of Section 235 (b). This was changed in mid-1977 to a general policy of parole into the community.

In July, 1981, the Administration concluded that the release of large numbers of undocumented aliens awaiting their exclusion hearing seriously impedes the hearing process, unacceptably burdens local communities, and draws ever-increasing numbers of illegal aliens who may hope to evade all legal proceedings following their resettlement. These consequences in fact resulted when the policy of detaining excludable aliens was abandoned in 1977. For these reasons, the Administration has resumed detaining such persons pending their hearings, a policy we are pursuing even-handedly with respect to nationals of all countries. Undocumented aliens arriving by boat or across land borders are detained pending final determination of their asylum petitions and/or exclusion hearings. Where special humanitarian considerations exist, parole may be authorized. Thus, aliens with immediate relatives with legal status in the United States, children, pregnant women and others with medical problems are considered for release.

b. Q: What is the daily cost of detaining Haitians and how much has been expended this fiscal year on the detention of Haitians, the interdiction effort (including total Coast Guard expenditures) and the costs involved in the deportation, exclusion and other legal proceedings and INS manpower costs?

A: The daily cost of detaining Haitians is approximately $28 at Krome North and $70 at Fort Allen. The higher cost at Fort Allen has already dropped as high start-up costs are amortized, and it is expected to drop further.

Figures are not available for all the activities related to Haitian undocumented arrivals. The total cost obligated during the first quarter of FY 1982 by the Detention and Deportation program for Haitians was $7,520,695. This does not include costs for legal proceedings. We have no cost figures for Coast Guard operations, but INS obligated for the interdiction program during the first quarter of FY 1982, $11,000 apart from salaries for the four officers present on the Coast Guard cutter.

The total costs of the detention and interdiction program are far less than the cost to federal, state and local governments of the unabated growth of illegal Haitian arrivals and their release into the community.

c. Q: Has the detention policy had the effect of driving Haitians underground, where previously they came forward and identified themselves to INS?

A: Perhaps to some extent, but it is wrong to assume that most Haitians came forward to INS during the period of community release and work authorization. Those who did come forward generally did not maintain current addresses with the Service and did not appear for interviews and hearings. Therefore, under the previous policy of release most went underground with regard to the Service.

d. Q: What is the current monthly rate of new arrivals of Haitians?

A: During the first four months of FY 1982 the new arrival rate has been 110 per month. This compares with 1178 per month for the same period in FY 1981. The month by month figures are as follows:

	FY 1980	FY 1982
October	2280	306
November	1121	47
December	543	46
January	769	41
TOTAL	4713	440

e. Q: How many have interdicted on the high seas to date?

A: A total of 162 Haitians have been interdicted from two vessels. In both instances the interception by the Coast Guard saved the lives of the Haitians, for the vessels were unseaworthy and sank shortly after the Haitians were removed. This interdiction program has clearly had a significant, deterrent on illegal migration by Haitians. Although the deterrent effect cannot be directly measured, the drastic drop in arrivals noted above indicates the success of the program.

TREATMENT OF SALVADORANS

a. Q: Given the escalating civil strife in El Salvador and the risk of random violence -- similar to conditions in Nicaragua in 1979 and Lebanon in 1975 -- why has the INS not adopted the special immigration measures, particularly granting extended voluntary departure, to Salvadorans in the United States as we did the Nicaraguans and Lebanese?

A: The establishment of a general program of extended voluntary departure for nationals of any country depends on an assessment of actual conditions prevailing in that country. The Attorney General and INS rely upon the Department of State for this assessment. We are in continuous contact and discussion with the Department of State regarding this matter and to date the State Department has not recommended that voluntary departure status be given to Salvadorans.

b. Q: What has been the recommendation of INS to the Department of Justice and the Department of State on this issue?

A: INS provides information to both the Department of Justice and State as to the number of Salvadorans apprehended and detained, those requesting rather than waiving deportation hearings, asylum petitions received, and contacts made by groups advocating the non-return of Salvadoran nationals. The Department of Justice has asked the State Department for a report on country conditions in El Salvador to be updated periodically to inform the Attorney General.

Any decision regarding the extended voluntary departure issue will be made jointly with the Department of State and at their recommendation.

MANAGEMENT QUESTIONS

Congress has repeatedly expressed its deep concern over the many management problems confronting INS.

a. Q: What are your priorities in this area?

A: I intend to be a hands-on manager of the Immigration and Naturalization Service. My previous experience in California state government tells me that no agency head can properly direct policy unless he is also acquainted with agency operations and the problems and challenges faced by agency managers down the line.

Since becoming Acting Commissioner on January 4, 1982, I have commenced a number of management directions. There are management problems in INS, and at this point I won't pretend to have answers to all such management problems. A major need is management stability and continuity. Much has been done to identify management problems. One of my major goals is to initiate or consolidate appropriate improvement efforts.

I have been impressed by much of the work of the President's Management Improvement Council and the concurrent internal activities to develop an INS Mission Plan, a Long Range ADP Plan, and annual program priorities for implementing these overall plans and new policy initiatives.

I have initiated a study of INS organizational structure and decision process, in which field managers are vitally involved as study group members. The goals of this process are concrete improvements in operational effectiveness, uniformity in policy implementation, and sensible flexibility for managers to exercise their responsibilities. Service managers must know what is expected of them and be held accountable. Lines of authority must be clear and communications must be direct so that policy is not confused and emergent issues are promptly addressed. An appropriate balance between INS responsibilities for enforcement and service must be maintained.

One major priority for me is to assure that policy is not established apart from credible, consistent and effective implementation.

Automation of Service functions is another priority, which I will outline more fully below.

Effective operations must rely on a more efficient use of personnel. This means rethinking our approaches and the detail of scrutiny in both Service adjudications and enforcement. The INS Mission Plan has established our priorities. We will focus resources on priority areas with biggest payoff for enforcement and service goals. I plan to analyze various alternatives to deal with these difficult areas and follow-up with systematic program evaluation to ensure that we meet our goals. All of this can be summed up as strong leadership, continuity, and strategic planning for the agency's future.

The Service has already taken a number of initiatives. The Omnibus Immigration Control Act before Congress would provide additional authority, but also add new responsibilities.

I appreciate this committee's support for the Immigration and Naturalization Service, and look forward to an effective working relationship.

b. Q: What steps have been taken to implement the Kratzke report's recommendations?

A: The PMIC Report covered several general areas. I am in the midst of discussing many of the recommendations with Service personnel but I can now comment on some.

Organization Structure. I have appointed an organizational study team to address INS organizational and functional issues. This study will concentrate on the INS decision process and organizational structure in order to improve operations and management and to effect cost savings.

Effectiveness of Planning and Evaluation. I have reviewed the Service's Mission Plan and the FY 82 budget execution and will move forward with implementation. Included are careful monitoring and evaluation of selected priority strategies.

Personnel Management. 36 of the 56 recommendations on personnel management have already been approved. I am reviewing the balance with the Personnel Office.

Automated Data Processing. An ADP Long Range Plan has been forwarded to the Department of Justice for review and approval. Immediate priorities are the interim ADP activity, nonimmigrant document control and conversion of the MIRAC system to the central index of the long range plan. I intend to work closely with the Department, GSA and OMB in all of these efforts.

Fiscal Management. Our fiscal management is improving. We are on target for obtaining GAO certification of our financial system. A tracking system has been established for implementing recommendations regarding resource allocation and budget execution. Given the scarcity of resources, this must remain a priority.

Employee Code of Conduct. The FY 82 program priorities include the development of a new code of conduct for employees. I support this.

Contract and Procurement Function. Procurement operations are now running effectively and we will assure that this continues.

Overtime Pay. Two bills are currently pending in Congress to repeal the 1931 Act covering overtime for both INS and Customs Inspectors.

In summary, many of the recommendations have already been approved and either implemented or in process. I will review the balance of the recommendations and implement as appropriate.

c. Q: What plans have you for expediting efforts to increase utilization of computers by INS?

A: Interim automated support for Naturalization and the Detention and Deportation areas are under development. Implementation of the first phase of Naturalization support is expected to take place in our Los Angeles District Office in May 1982. Initial automation support for Detention and Deportation in San Diego is planned by September 1982. Each of these initial implementations will be followed by installation at other district offices.

Development of a Long Range ADP Plan has been completed. I have approved the plan in concept and development has begun on the first group of systems to be developed. These include:

- The interim systems for Naturalization and Detention and Deportation -- initial implementation scheduled for May 1982 and September 1982, respectively.
- A new Nonimmigrant Information System is currently under development -- implementation is scheduled for January 1983.
- A combined INS/State Department/Customs Service Lookout database -- prototype implementation scheduled for February 1982.
- A Central Index Database -- initial implementation by July 1983.
- Fleet Management System scheduled for October 1982.

We are also presently implementing a small automated system in Miami to support the hearings process for the Haitians currently detained at Krome. This has been possible because we have awarded a contract to National Data Corporation for computer and communications support in accordance with the Interim ADP program.

INS PERSONNEL

Over the past two years there has been growing evidence of serious personnel problems within INS -- particularly complaints of strained relations between management and union officials and serious morale problems.

a. Q: What steps do you plan to deal with these problems?

A: I believe that good relations between management and union depends upon regular contacts between managers and union representatives at all levels before problems occur. Toward that end I will re-

main open to contact with union leaders. Further, we are providing the unions with notification and, wherever possible, request opportunities to confer on new program and policy changes prior to their implementation. Differences should be resolved at the local level wherever possible and managers must be concerned about the perception of managerial decisions as well as maintaining proper management control.

In March, we plan to enter into negotiations with the INS National Council of AFGE on a new contract, during which many issues will be aired and, I believe, resolved. I have already met with both union and management negotiators. I am hoping that the Federal Labor Relations Authority will render its decision regarding bargaining unit representation for the Border Patrol as soon as possible.

b. Q: Have you met with union representatives? What efforts do you believe are necessary to open a dialogue with INS employees and to deal with morale problems?

A: I have met with INS Council President Michael Harpold and participated briefly in the consultation with both AFGE councils held in mid-January.

I am meeting with INS personnel in the field wherever possible in order to ascertain their concerns, to improve productivity and morale, and to build up the internal and public image of INS. A great deal of dedication to perform exists in INS. Other new managers--General Counsel Maurice C. Inman and Joseph Salgado. Associate Commissioner for Enforcement--are also traveling widely to become acquainted with local operations and the employees on the line.

More than anything else clear policies and consistent concerned leadership will address the morale problems among INS employees. The President announced his immigration initiatives in July and we are pursuing the passage of the Omnibus Immigration Control Act, which can provide some additional means for INS to effectively manage U.S. immigration laws.

SILVA CASES

a. 1) Q: What has been the policy of the INS for dealing with the situation which has resulted from the termination of the injunction?

A: Directives have been sent to the field to accomplish the following goals: Determine from the names and recorded addressed of all remaining Silva-letter recipients that none have been accorded immigrant visa numbers under the district court's order; to advise those who did not receive visa numbers of the termination of the Silva injunction against their deportation and the end of their work authorization that flowed from their Silva class status; to ask these persons to come to INS offices for interviews to see whether they might qualify for other benefits under the law or for administrative relief and to advise those who do not qualify that they will have 30 days voluntary departure.

In addition, we have attempted to explain to the public that there will be no mass round-up of Silva letter-holders. Persons are being sent letters asking them to come in for interviews scheduled according to the capacity of the INS district offices to accommodate them. Persons encountered in INS enforcement operations will be advised of their change in status and may be

immediately processed by Service personnel if there is clear evidence that the alien is attempting to evade the Service request for an interview for compliance with the final order.

2) Q: Is this policy being implemented uniformly by all Regional INS offices?

A: Yes, it is. Initial variations regarding processing of Silva letter-holders contacted in field activities have been corrected. Individual regions and district offices will be able to complete their processing and notification of the remaining Silva class members before others, because of smaller numbers of letter-holders relative to INS staff. In this sense the Western Region, and the Los Angeles and Chicago district offices will not complete their processing for several months.

3) Q: Is this policy also being communicated to the Border Patrol, and how have they responded to Silva letter-holders they have encountered?

A: Yes, a common policy has been communicated to the Border Patrol which is likely to contact Silva class members during city patrol activities or at traffic checkpoints. To ensure uniform handling of Silva letter-holders by Service investigators and Border Patrol agents, precise instructions have been sent to the field. There were some instances in December in which Border Patrol agents detained Silva letter-holders rather than directing them to report for interviews at a later time. Now, such detention and immediate processing will only occur when an alien is encountered in possession of a call-in letter with an expired interview date or there is clear evidence that an alien is attempting to evade the Service request for an interview.

b. Statements from INS spokespersons indicate that Silva letter holders are being notified that their permission to remain in the U.S. legally has been terminated and that they are to report to INS for interview to redefine their status.

1) Q: What exactly takes place when these people are called in for interviews?

A: A Service officer will explain the final order of the federal court and ask questions of the individuals to ascertain any change in their status and requests for administrative relief or hearings on their deportability. The "Silva letters" will be collected and the individuals will be given 30 days voluntary departure or other authorization to remain in the United States under administrative relief pending the granting of an immigration benefit or determination of their case in a deportation hearing.

2) Q: What type of information is elicited?

A: The officer would inquire as to the personal and family status of the Silva letter-holder, their plans for leaving the United States, any personal circumstances or basis for claiming another immigration benefit or qualifying for administrative relief, whether or not a person wanted a deportation hearing or was going to depart voluntarily, etc.

3) Q: What criteria does the INS use to determine whether an individual should remain in the U.S.?

A: *In the case of applicants for immigrant visas*, a person will not be allowed to remain in this country unless a visa number is expected to be available within 90 days. Individuals for whom immediate departure may cause a hardship due to health, economic interest (e.g. need to sell home), personal and family plans (e.g. children completing remaining two months of school), etc., administrative relief is available on a case by case basis for longer periods of voluntary departure and, in very rare instances, deferred departure.

4) Q: What happens to those individuals whom INS determines cannot remain?

A: The Service informs the individuals that they will have 30 days (or longer in some instances) to depart voluntarily from the United States. If an individual indicates an unwillingness to depart or a desire for a deportation hearing, an Order to Show Cause is issued and a deportation hearing is scheduled.

5) Q: Are these people advised that they have a right to a presence of an attorney at these interviews?

A: At the time of their initial contact with the Service, prior to receiving their Silva letters they were informed of the right to counsel while being interviewed. No specific mention of the right to counsel is made in the call-in letter. However, if there is an attorney of record noted in the alien's file, that attorney will receive copies of the call-in letter and the letter notifying the alien of the dissolution of the Silva injunction.

Moreover, if the individual requests or is held for a deportation hearing, the Service officer will again advise of the right to counsel for that hearing.

6) Q: Are they advised that they have a right to a deportation hearing?

A: Yes.

7) Q: Are they advised that they may be eligible for suspension of deportation or other relief?

A: Yes. Service officers are primarily seeking information that would indicate qualification for benefits or consideration for administrative relief which may be granted by INS district directors. However, persons are informed that they may be eligible for suspension of deportation, which is considered by immigration judges at the time of a deportation hearing.

c. The INS has publicly stated that they will conduct no massive round up of Silva letter holders, nor will they actively seek out these people for the purpose of deporting them. However, in certain regions of the country the INS has stepped up workplace raids. These are regions where large numbers of the Silva class members reside and work (e.g., Los Angeles). These workers thus find themselves in a very precarious situation.

1) Q: What will happen to Silva letter holders who are apprehended during the course of these workplace raids?

A: First, let me indicate that the increase of INS visits to workplaces where illegal aliens are alleged to be working is part of an overall shift from individual investigative casework and street stops to greater focus on places of employment. It has

nothing to do with the lifting of the Silva injunction. When Silva letter-holders are encountered as part of these visits, they will be handled somewhat differently depending on whether or not they have previously received a call-in letter and/or notification of the dissolution of the Silva injunction. Persons would fall into four categories:

a) If the individual is in possession of a call-in letter for a future interview date, his or her compliance will be assumed. The alien will only be immediately processed if he or she is not presently residing at the address of record and there is clear evidence that the alien is attempting to evade the Service request for an interview.

b) If the individual is in possession of a call-in letter with an expired interview date, he or she shall be brought to a Service office at the discretion of the officer for appropriate determination of status and/or processing.

c) If the individual has not received a call-in letter or has not been notified of the termination of the Silva injunction, he or she will be served with a notification letter and his or her Silva letter will be lifted and placed in the alien's "A" file. The alien will be either processed immediately or advised to report to the district office for an interview on a particular date.

d) If the individual has already been processed -- i.e. is no longer in possession of a Silva letter -- and is within the period of voluntary departure and work authorization that was given to them at the time of the interview, he or she will be assumed to be complying with the law. However, if his or her voluntary departure period has expired, he or she will be held by the Service for further processing and normally will be removed from the country under safeguards. If it is determined that persons should be removed from the country, they will be advised of the right to counsel and the right to a deportation hearing before an immigration judge.

2) As noted above, most persons will be directed to report for interviews at which their eligibility for relief will be discussed. In virtually all cases persons will receive at least 30 days voluntary departure. Only if a person is deportable on a ground distinct from the end of the Silva injunction, would he or she be asked whether they wish to waive a further hearing and accept removal under safeguards. Likewise, if a person has already had their eligibility for alternate status or relief reviewed and were in violation of their administratively-determined voluntary departure, they would be asked whether they wanted a deportation hearing or were prepared to depart voluntarily under safeguards.

d. Implications of proposed legalization title of the Omnibus Immigration Control Act for the Silva class members.

1) Q: Will the INS grant Extended Voluntary Departure to Silva letter holders allowing them to remain in the U.S. so that they can qualify for a legalization program?

A: No, the Service will not establish a policy to give extended voluntary departure for members of the Silva class who did not receive immigrant visa numbers. The Administration does expect to see legislation passed to legalize the status of many illegal aliens. However, the timing of the passage and the implementation of the program is uncertain. It is not deemed to be proper

to create an extended voluntary departure program for this or any class in anticipation of future legislation.

2) Q: If not, wouldn't this undermine the effectiveness of a legalization program?

A: No, we do not anticipate such a negative effect.

3) Q: Wouldn't the effectiveness of a legalization program depend on the willingness of undocumented persons to come forward and identify themselves to the INS?

A: No, because our current planning calls for using voluntary agencies and community organizations both to inform illegal aliens regarding the legalization program and to advise them as to their likely qualification under its terms. They will not have to identify themselves to INS prior to receiving some assessment of the likelihood of their qualification for legalization.

4) Q: And isn't it true that if potential beneficiaries of a legalization program see persons such as Silva letter holders, who have substantial equities, being deported, would it not deter these people from applying for legalization?

A: No. In addition to the reason mentioned above, the very history of the Silva program should reassure them. First, persons qualifying for Silva class status were processed by Service personnel and given a legal basis for remaining and working in this country during the pendency of the Silva case. Further, INS processing of Silva letter-holders who did not receive visas should indicate an effort to treat persons with respect, to attempt to establish any equities which would qualify persons in other ways for an immigration benefit or adminstrative relief, and, finally, to afford individuals the opportunity to depart from the United States voluntarily.

Senator SIMPSON. We do have two further witnesses, one a Mr. Robert P. Davidow, professor of law, George Mason University, who will testify regarding Mr. Robert Bork, and then Arnoldo S. Torres, the national executive director of the League of United Latin American Citizens [LULAC], who will be testifying with regard to Mr. Nelson's nomination.

Mr. Davidow, please.

Do you solemnly swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

Mr. DAVIDOW. I do.

Senator SIMPSON. Thank you. Please proceed. Did you have a summary?

Mr. DAVIDOW. Yes, Senator, I submitted a statement, a prepared statement, a copy of which I think you probably have there.

Senator SIMPSON. Could you summarize that statement for us?

TESTIMONY OF ROBERT P. DAVIDOW, PROFESSOR OF LAW, GEORGE MASON UNIVERSITY

Mr. DAVIDOW. May I just, as an introductory matter, say that I am appearing in an individual capacity and not in a representative

capacity. I do appreciate the opportunity to appear here today. As you know from my statement, I am here in opposition to the nomination of Mr. Bork.

In my prepared remarks, I first indicated that I had no quarrel with the basic intellectual competence of Mr. Bork or with his training. My opposition is based on two other matters: I mentioned first the issue of the first amendment, and second his involvement in the Watergate era, more specifically, the firing of Archibald Cox.

I would like to treat those in reverse order, if I may, in view of some of the things he said. I would like to deal with the Watergate issue first, if I may.

WATERGATE INVOLVEMENT

In order to put this in perspective, I think we have to recall the historical situation in which the firing of Archibald Cox occurred. This was not simply a matter of a failure to adhere to a department regulation, although the failure to adhere to this department regulation was, in my view, not a mere technicality. I am supported in that view by the decision, albeit later vacated, of the District Court in *Nader* v. *Bork*,[1] in which Judge Gesell found that the firing of Archibald Cox was indeed unlawful.

I do not regard that as a mere technicality. I suppose you could say that there are lots of technicalities in the law. For example, if a police officer has probable cause to search a home and neglects to get a warrant, that is a technicality, but it is an extremely important technicality.

However, beyond that, it was not simply the unlawful firing of Archibald Cox. We must remember why the President wanted Archibald Cox fired. He wanted Archibald Cox fired because the U.S. Court of Appeals had affirmed a lower court decision that the President had to surrender some tapes to Judge Sirica.

Instead of appealing that decision to the U.S. Supreme Court as the President was entitled to do, he, in effect, ignored it. That is, he let the time for appeal pass. It was at that point that he directed Mr. Cox not to proceed further. Mr. Cox said, in substance, "No, I will not accept that. I am going to proceed further." It was at that point that the President wanted Mr. Cox fired.

Therefore, when Mr. Bork purported to fire Archibald Cox, he was not merely violating a department regulation, but also assisting the President in refusing to acknowledge the authority of the U.S. Court of Appeals; so it is a little more than just a technicality. Very frankly, I think to appoint Mr. Bork under these circumstances, and given the importance of the Government's obedience to its own rules, is appalling.

FIRST AMENDMENT

There is, of course, the first amendment issue to which Mr. Bork addressed himself this morning. He did of course indicate that his article in the Indiana Law Journal was an academic matter, and

[1] 366 F. Supp. 104 (D. D.C. 1973), appeals dismissed as moot, No. 74-1260 (D.C. Cir. Aug. 20 and Oct. 22, 1975), vacated on remand, No. 1954-73 (D. D.C. Oct. 29, 1975).

that of course he would abide by the decisions of the U.S. Supreme Court. I am gratified to hear that.

However, as we all know, there are many cases in which there is no binding precedent, and therefore we all assume that a person's beliefs, attitudes, and values will affect to some extent the decision of that court. It is inevitable that this will happen. Therefore, I am a little concerned still about the views that he expressed in his 1971 article, particularly the assumption that only explicitly political speech is protected by the first amendment and the process by which he arrived at that conclusion, namely the assumption that logic could lead one to the proposition that only explicitly political material is covered.

With all respect to Mr. Bork, I simply do not agree. I do not think that is true. If you assume that the basic purpose of the first amendment was to protect speech that is relevant to Government, that does not logically or in any other way lead one automatically to the conclusion that only explicitly political speech is protected. There is no cut and dried distinction as to what is pertinent to legislative function and what is not.

We must consider that when we are talking about the protection of speech, we are not talking only about speech directed to the Federal Government. We are talking about speech directed to the State and local governments. Since at least the State governments have the police power, there is very little that is not pertinent to the work of State and local governments.

Therefore, it seems to me that it is equally logical to infer from the first amendment that all speech is presumptively protected speech under the first amendment, and that only when some other nonspeech related value such as the need to avoid imminent violence comes along, is there a limit on such speech. I am frankly still concerned about the fact that this view will indeed influence Mr. Bork in his decisions, as I am sure it will, just as all judges are to some extent influenced by their own backgrounds and their beliefs.

JUDICIAL SELECTION

However, I believe it does raise a broader question which relates to the whole question of selection of judges.[1] As I did indicate in my——

Senator SIMPSON. Sir, I do not want to be rude. I have let you testify now for nearly 10 minutes and your statement is only 4 pages long, which I could have accepted into the record. If you could summarize, I was not prepared to chair the remaining balance of a long hearing. I have some other obligations. As I say, I am not trying to be rude but if you could summarize in a minute more—because your statement is going into the record and it is not long——

Mr. DAVIDOW. I will summarize by saying that I oppose him on two grounds: one, his views on the first amendment, which are about as extreme as those of any responsible legal scholar of recent

[1] See Davidow, "Judicial Selection: The Search For Quality and Representativeness," 31 Case Western Reserve Law Review 409 (1981).

years, and I assume that disclaimers to the contrary, inevitably those views will affect his decisions in the first amendment area.

Second, I believe that his participation in the Watergate events makes his appointment an inappropriate symbol, and that the question is not merely one of failure to obey a regulation even though a district judge found that he was in violation of the regulation, but that indeed he played a part in former President Nixon's effort to avoid recognizing the force of law and obeying the law.

I think that under those circumstances, that does raise questions about the extent to which he would require the Government to adhere to the law. I believe this is a most important principle. In fact, the late Lon Fuller of Harvard said it was the most important principle of legality—that the Government adhere to its own laws.

Therefore, for those two reasons, I respectfully oppose the nomination of Mr. Bork.

Senator SIMPSON. I thank you, Professor Davidow, for your testimony. Both your written and spoken remarks will appear in the record, and I thank you very much.

Mr. DAVIDOW. Thank you. I appreciate the opportunity to appear.

Senator SIMPSON. Thank you.

[The prepared statement of Mr. Davidow follows:]

Prepared Statement of Robert P. Davidow

I appreciate very much being afforded the opportunity to appear before this committee in an individual capacity to oppose the nomination of Robert H. Bork for the position of Judge of the United States Court of Appeals for the District of Columbia Circuit.

A few prefatory observations are perhaps in order. First, I readily concede that Mr. Bork is competent to be a federal appellate judge in the narrow sense that he possesses the requisite intellectual capacity and training.

Second, the problems presented by Mr. Bork's nomination are in part the result of the present method of federal judicial selection, which effectively permits the President to appoint individuals whose beliefs, attitudes, and values are compatible with those of the President. If a different method of selection were being utilized, my appearance today would probably be unnecessary. So that you will not gain the impression that I am being merely negative in my approach to federal judicial selection, let me say that I have just published an article in the Case Western Reserve Law Review, in which I have proposed new methods of judicial selection.* I am not asserting that someone like Mr. Bork would never be selected under my proposals; what I am suggesting is that my proposals would make it unlikely that judges would come from only a very narrow band of the political spectrum.

My opposition to Mr. Bork is two-fold. First, he has expressed views regarding the First Amendment that are at least as extreme as those of any other responsible legal scholar of recent years. More specifically, I refer to Mr. Bork's views set forth in an article entitled "Neutral Principles and Some First Amendment Problems," which appeared in 47 Ind. L. J. 1 (1971). Mr. Bork apparently believes that the First Amendment protects only speech that is "explicitly political." Id. at 20. I am not sure what

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*Davidow, Judicial Selection: The Search For Quality and Representativeness, 31 Case Western Reserve Law Review 409 (1981).

"explicitly political" means, but it does seem clear from this article that Mr. Bork has a very limited view of what the First Amendment protects. Presumably, almost all art and literature would be beyond the constitutional pale.

Moreover, despite his contentions to the contrary, Mr. Bork's radical views are not based on "neutral" principles. If it is difficult to distinguish protected speech from non-protected speech, as it undoubtedly is in some instances, one can just as easily come to a conclusion contrary to that reached by Mr. Bork - namely, that doubtful cases ought to be resolved in favor of those seeking to speak in order to insure that all speech that is arguably relevant to the political process will be protected. There is no constitutionally fixed category of subjects that are potentially of legislative concern. Therefore, one can conclude that all speech is presumptively pertinent to legislative action and hence entitled to constitutional protection, unless some non-speech related interest (e.g., the need to prevent imminent violence) requires that the speech be suppressed.

There is an additional and perhaps more important reason for my opposition to Mr. Bork. I refer now to his part in the firing of Archibald Cox as Special Prosecutor in 1973. You will recall that the Attorney General resigned rather than fire Archibald Cox; the Deputy Attorney General was discharged because of his failure to fire Archibald Cox. Mr. Bork apparently had no such claims. His action, however, was subsequently found by a federal judge to be unlawful. Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973), appeal dismissed as moot, No. 74-1260 (D.C. Cir. Aug. 20 and Oct. 22, 1975), vacated, No. 1954-73 (D.D.C. Oct. 29, 1975). Although the decision technically is not a precedent because the judgment was vacated, the decision does represent the considered opinion of a well-respected jurist that Mr. Bork's dismissal of Cox was unlawful because the Department of Justice regulation then in effect provided that the Special Prosecutor was not to be removed "except for extraordinary improprieties on his part." Id. at 107. The Court concluded:

> "Even more directly on point, the Supreme Court has twice held that an Executive department may not discharge one of its officers in a manner inconsistent with its own regulations concerning such discharge. See Vitarelli v. Seaton, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959); Service v. Dulles, supra. The firing of Archibald Cox in the absence of a finding of extraordinary impropriety was in clear violation of an existing Justice Department regulation having the force of law and was therefore illegal."

Id. at 108.

In addition, the Court found that the subsequent effort retroactively to rescind the regulation did not cure the illegality:

> "Even if the Court were to hold otherwise, however, it could not conclude that the defendant's Order of October 23 revoking the regulation was legal. An agency's power to revoke its regulations is not unlimited - such action must be neither arbitrary nor unreasonable. Kelly v. United States Dept. of Interior, 339 F. Supp. 1095, 1100 (E.D.Cal. 1972). Cf. Grain Elevator, Flour and Feed Mill Workers v. N.L.R.B., 126 U.S.App.D.C. 219, 376 F.2d 774, cert. denied, 389 U.S. 932, 88 S.Ct. 296, 19 L.Ed.2d 285 (1967); Morrison Mill Co. v. Freeman, 124 U.S.App.D.C. 334, 365 F.2d 525 (1966), cert. denied, 385 U.S. 1024, 87 S.Ct. 741, 17 L.Ed.2d 672 (1967). In the instant case, the defendant abolished the Office of Watergate Special Prosecutor on October 23, and reinstated it less than three weeks later under a virtually identical regulation. It is clear that this turnabout was simply a ruse to permit the discharge of Mr. Cox without otherwise affecting the Office of the Special Prosecutor - a result which could not legally have been accomplished while the regulation was in effect under the circumstances presented in this case. Defendant's Order revoking the original regulation was therefore arbitrary and unreasonable, and must be held to have been without force or effect."

Id. at 108-109 (footnote omitted).

In order to put Mr. Bork's actions in proper perspective, one must decide how important it is to secure compliance by the government with its own rules. Arguably one of the most important principles of legality is the principle of "congruence between official action and declared rule." See L. Fuller, The Morality of Law 209 (rev. ed. 1969). If governmental officials do not obey the law, it is not reasonable to expect that ordinary citizens will have sufficient respect for the law to obey it. The appointment of Mr. Bork, the "chief executioner" of the "Saturday night massacre," to the position of Judge of the United States Court of Appeals for the

District of Columbia Circuit would be very poor symbolism indeed. But apart from the symbolism, Mr. Bork's actions as a government official raise serious questions about the extent to which he, as a judge, would require the federal government to adhere to constitutional and other legal limitations.

For the foregoing reasons I oppose the nomination of Mr. Bork for the position of Judge of the United States Court of Appeals for the District of Columbia Circuit.

I will be happy to try to answer any questions that you may have regarding the basis of my opposition.

Senator SIMPSON. Now, Arnoldo S. Torres, please, the national executive director of LULAC.

STATEMENT OF ARNOLDO S. TORRES, NATIONAL EXECUTIVE DIRECTOR, LEAGUE OF UNITED LATIN AMERICAN CITIZENS

Mr. TORRES. Short and quick, Senator. I will get right to the point.

The record reflects the organization that I represent. It is the League of United Latin American Citizens. We do not have any specific difficulties with the nomination of Mr. Nelson. We would have preferred to have had an individual who had had some immigration experience outside of those that he has learned on the job for the last 2 or 3 months.

Nonetheless, after our meeting with him in December, we found him to be very candid, very open, and we believe that we can establish a very positive working relationship with Mr. Nelson. Despite the lack of clarity and thoroughness of background on the issues, we suspect that he will rely on his established staff and some of the other people in the department to provide him with that information.

This hearing has gone over a number of issues that we have raised in our written testimony: The issues of the lack of an information data system, the lack of a reporting system for entry and exit, a number of things. All of them have been responded to by the Commissioner-designate as being under consideration as well as in the process of being worked out.

The specific recommendations that we make in our written testimony ask the committee to require of Mr. Nelson to report back to this full committee or, better yet, to the Subcommittee on Immigration, on the specific progress being made in these areas and a timeframe which you can look at it specifically in writing, in order to gage exactly the kind of effectiveness the program can have as well as the impact it would have in view of your legislation that you intend to introduce, and as you have indicated will hopefully be acted on by Congress.

I think it is fine that Mr. Nelson has indicated that a lot of progress is being made but unfortunately none of that knowledge is made public to many people, and we really do not know from the responses that he provided today any specifics as to where things are. We do not know what the degree of linkage is between State and Justice; we do not know to what degree progress has been made in establishing an information system; we do not know to what degree the control system has been developed.

I think that outside of the conversations that you may have had with him with regard to the configuration of the management chart, about the different offices, perhaps there are very few other specifics that are known. I think it is very important that the committee be aware of it, as well as groups like ours that are very concerned with improving the situation at the INS.

There are two points that I feel very compelled to bring out. One is the issue of service. INS has gone through a transformation in the last 7 years in which it is viewed primarily as an enforcement entity. It is a service entity also. When we met with the Commissioner-designate, he agreed that in fact they were suffering from an image problem and a public perception problem of it being just an enforcement entity, and that he wanted to do something about that.

We would ask this committee specifically to ask of Mr. Nelson to provide the committee with a specific plan of how he is going to go about changing the public perception of the INS as also a service agency, which is 50 percent, I believe, of what it is supposed to be doing. However, in the discussion today we have only talked about it primarily in the sense of enforcement. Therefore, I think today is a very good indication of the obsession, in some sense, that people have with INS as being primarily only an enforcement agency, when in fact that is not the case, at least not truly the case.

The other issue is the independence of district directors. We found in the one celebrated case that we indicate in our written testimony of Andres Hernandez, the Cuban who has been deported, who latched onto a Panamanian freighter in Havana, the district director took it upon himself—from our understanding and our discussions with the lawyers of this individual—to contact a mid-level civil service nonpolicymaking decision individual in the Department of State. Based on that consultation, the district director agreed that this individual was deportable and shipped him back to Havana by a commercial flight.

Subsequently, you have had a lot of anger on the part of the Cuban-American community in Miami since then because this is the first time in 23 years that this action has been taken. That to us is a very good example of the independence that some district directors operate with, and perhaps at times a tendency to make policy on their own as opposed to implementing policy.

I do not think that the district director should necessarily be condemned or anything of that nature but I think that there should be a better mechanism and a much better control process to insure that this kind of situation is not going to be the practice but more or less the exception. It is truly unfortunate that it has happened. There is a severe severance of ties between the Cuban-American community of that State and the INS, something that you did not

need at this time. You have enough problems in that part of the country right now, and as a result of this direct action which we think can be improved on significantly if a mechanism is instilled to improve that situation specifically, about controlling and monitoring district directors.

The last case brings us to the *Silva* letters. We would be very negligent if we did not bring it up. It is a hoopla case, a very celebrated case.

Senator SIMPSON. That was your phrase?

Mr. TORRES. Yes.

Senator SIMPSON. I am glad you got that in there.

Mr. TORRES. Anyway, I feel very concerned about it, obviously reflecting the views of our community. It was unfortunate timing. You had the INS increase their area surveys January 5. You had the recall of the *Silva* letter people primarily begin to start up January 5. The impression was, to the general public and specifically to our community, that there was an all-out attempt to deport the *Silva* letters, probably not the truth, but nonetheless it was again an issue of public perception. That is how our community has viewed it; that is how many papers in the Southwest have written it up; and that is how many of our leaders in the community have played it up.

Therefore, everything reinforces itself and yet the issue could have been avoided by simply bringing in Hispanic organizations to discuss the fact that this was going to be the new policy: What can you do to help INS communicate with the people out there as to what is going to take place? Let's go ahead and do it, as opposed to having a situation that really became an extremely panic-oriented environment in which the only ones that got anything out of it were perhaps the press. Certainly the people in the *Silva* situation did not get much out of it except to panic and become very nervous about the potential for being deported.

Therefore, outside of the comments that we have made, in addition to those that we have indicated in our written testimony, we would ask that this committee or the Subcommittee on Immigration request the kind of information on timetables and specifics from Mr. Nelson and the INS on the progress being made in these different areas. It would be helpful to the whole debate on immigration and certainly would be a very timely effort in view of the fact of your hopes for your legislation. I think if we gage better what INS is capable of doing, we can gage much better what in fact a piece of legislation can really do in dealing with the issue of immigration and refugees in this country.

That is the end of our summary. I am sorry we took so long but we thought these points should be made. Thank you.

Senator SIMPSON. You, Arnoldo, have been a most helpful witness in the sense of being available to testify on all of the issues that have come before us. You are a remarkable spokesman for the Hispanics of America, and more particularly for your group, the League of United American Citizens, LULAC. You and I have had some rather rich conversations and I have enjoyed them thoroughly.

I am pleased that you used the word "hoopla" when you got to the *Silva* decision because I was in Mexico when that occurred, and

it was an extraordinary thing for me to watch, not only as a lawyer but so deeply involved in this issue. This decision came down and was filed on December 24, 1981, and the hoopla came January 6, after everybody got busy and ginned up the hoopla. I have never seen less substance on an issue in anything I have observed since I came to this place, more smoke and less fire.

The Mexican Ambassador to the United States, a remarkable man in my mind, Hugo Margain, understood every bit of the reason behind the *Silva* decision in book, page, and hymn number. When he was sought out and the press indicated that he was being withdrawn from Washington, he was stunned because he knew the substance of the *Silva* decision. When he was briefed by Ambassador Diego Asencio, Diego tells me that he was more on top of the issue than anyone in the United States and had no reason for alarm whatsoever.

I thought our Ambassador, our U.S. Ambassador to Mexico handled it beautifully. I believe he referred to it all as simply being "false," which was a term that certainly no one could misconstrue. He also used the term "played it up," and that is exactly what happened with it. The panic that came could have well been averted by simple communication from both sides, not from one waiting for the other one to show.

However, when I see a decree that is filed on December 24, and the hoopla is ginned up on January 6, I know that somebody has been in there with an awful big stick whooping it up. Therefore, the *Silva* decision, I say again and said to President Lopez Portillo, there will be no deportations any more than there have before.

Fifty percent of those people that are left over on the *Silva* letter—and they knew they would be, because there had to be a cutoff date, because 250,000 asked for the letter and there were only 149,000 under the court decree, and it doesn't take anything at all to figure that there will be 100,000 out in the cold—half of those are already in the legal process of being legalized in many ways and the other half will be handled on a person-to-person, case-by-case basis, first with letters and then with compassionate treatment. I assure you that we will assure that there is oversight to ensure that.

However, since you did comment on it, I did want to——

Mr. TORRES. Let me just——

Senator SIMPSON. Your turn. You get surrebuttal for 4 minutes.

Mr. TORRES. I think, you know, you underscored the thing about the hoopla but I think were some very serious problems presented to these individuals. Again, we do not know exactly if in fact the rights that are accorded to them in writing are in fact going to be accorded to them. I mean, we have to take INS at their word and, God knows, we have enough examples not to believe in that. That has always been our major concern.

I want to submit for the record a petition that the Mexican-American Legal Defense and Education Fund has drafted up that has every major Hispanic organization on it.[1] We also see a letter to the AG shortly after the decree was issued. We were not surprised. I mean, we did our homework on it. We did jump on it as

[1] The petition is on file with the committee.

quick as we could. We were asking very simply, why couldn't an extension have been issued by Executive order? It was a very simple thing to do and it could have been done for a small amount of people.

We did not agree with the decision. We felt that it could have been dealt with, as we suggested, by the President himself, but there were some serious problems and there probably will be. We have reported some situations to the INS that they are investigating now.

However, the problem when you get into this area of immigration and the INS is that you just really do not know if in fact the rights that are accorded to these individuals are in fact being provided to them, and if they are not, what is their recourse? That has always been a problem; that will continue to be a problem as long as this Congress does not take a detailed, specific attitude with INS and the community groups and the affected class.

That is why we make the recommendations that we do. We want to get you all a lot more involved in this, and to see exactly what INS is going to do. It will help us a great deal.

Senator SIMPSON. Well, we want your involvement too. That is very important. At least, we may not agree but we will surely know better about each other and that is what it is about.

I thank you for your testimony. I think you found as I did that Mr. Nelson is an accessible person——

Mr. TORRES. Yes, he is.

Senator SIMPSON [continuing]. And a listener, and I assure you that as we go through oversight of his new duties, when you have anything to share with the subcommittee, please do that, things that concern you. You will have more firsthand knowledge, perhaps, than others as we get into new immigration reform.

I agree with your comments about service. That man sitting back there is going to put service back in the title. It is in the title but we have to get back into it. However, you cannot do it when you have poor records systems and management systems. When we correct that and focus in on the importance of that, with the proper oversight of the subcommittee, I think we will indeed have service back in reality as well as in the title.

Mr. TORRES. All the more reason to give them more money for a computer system.

Senator SIMPSON. All right. If you will join me on that one, we will hammer away. I thank you, Mr. Torres.

[The prepared statement of Mr. Torres follows:]

PREPARED STATEMENT OF ARNOLDO S. TORRES

GOOD AFTERNOON, MR. CHAIRMAN AND MEMBERS OF THE SENATE JUDICIARY COMMITTEE. MY NAME IS ARNOLDO S. TORRES, I AM THE NATIONAL EXECUTIVE DIRECTOR FOR THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC). LULAC IS THIS COUNTRY'S OLDEST AND LARGEST HISPANIC CIVIL RIGHTS AND SERVICE ORGANIZATION WITH A MEMBERSHIP OF OVER 100,000 IN 44 STATES OF THE UNION.

THE HISPANIC COMMUNITY OF THIS COUNTRY IS VERY FAMILIAR WITH THE IMMIGRATION AND NATURALIZATION SERVICE (INS) AND ITS FUNCTIONS. A RELATIONSHIP HAS DEVELOPED OVER THE YEARS BETWEEN US AND CAN BE BEST DESCRIBED AS CONTROVERSIAL. ON ONE HAND THE INS HAS A RESPONSIBILITY FOR SERVICING THE IMMIGRATION NEEDS OF ALL PEOPLE AND AT THE SAME TIME IT IS RESPONSIBLE FOR ENFORCING THE IMMIGRATION AND REFUGEE LAWS OF THIS NATION. IN VIEW OF THE CONTINUING ATTENTION GIVEN TO THE FLOW OF UNDOCUMENTED WORKERS AND REFUGEES, THE ROLE OF THE INS HAS BECOME OF MAJOR IMPORTANCE TO THE FEDERAL GOVERNMENT AND TO THE PUBLIC. RECOGNIZING THAT THE MEDIA HAS PORTRAYED THE "IMMIGRATION PROBLEM" AS BEING PRIMARILY HISPANIC AND/OR BLACK AND COMING FROM THE CARIBBEAN AND LATIN AMERICA; AND THAT THE INS HAS FOCUSED ITS MAJOR EFFORTS IN THESE COMMUNITIES IN THE U.S., YOU CAN WELL UNDERSTAND THE IMPORTANCE WE APPLIED TO THE SELECTION OF COMMISSIONER TO THE INS.

THEREFORE, WE VERY MUCH APPRECIATE THE OPPORTUNITY TO COME BEFORE YOU AND PRESENT OUR INTERESTS AND CONCERNS SURROUNDING THE NOMINATION OF MR. ALAN C. NELSON AS COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE (INS) OF THE DEPARTMENT OF JUSTICE. WE ARE AWARE OF MR. NELSON'S ADMINISTRATIVE AND MANAGERIAL EXPERIENCE DURING HIS TENURE AS DIRECTOR AND ASSISTANT DIRECTOR OF STATE GOVERNMENT AGENCIES IN CALIFORNIA FROM 1969 TO 1975. WE ARE AWARE THAT A MAJOR CRITERIA FOR THE COMMISSIONER POSITION HAS BEEN THAT HE/SHE HAVE ESTABLISHED ADMINISTRATIVE QUALIFICATIONS. HOWEVER, IN VIEW OF THE SIGNIFICANCE GIVEN TO THE INS AND ITS EFFORTS TO DEAL WITH IMMIGRATION ISSUES WE STRONGLY BELIEVE THAT THE COMMISSIONER SHOULD POSSESS SOME EXPERIENCE WITH IMMIGRATION LAW AND PROCEDURES. PRIOR TO MR. NELSON

SERVING AS INTERIM DEPUTY DIRECTOR, WE ARE UNAWARE OF ANY SPECIFIC EXPERIENCE HE MAY HAVE HAD WITH IMMIGRATION ISSUES. WE WOULD ADD, HOWEVER, THAT AFTER OUR MEETING WITH MR. NELSON IN EARLY DECEMBER, WE ARE HOPEFUL THAT THIS LACK OF EXPERIENCE CAN BE PROPERLY ADDRESSED IN DUE TIME AND WITH THE ASSISTANCE OF HIS STAFF AND DEPUTY DIRECTOR.

WE WOULD LIKE TO BRING TO THE ATTENTION OF THIS COMMITTEE SOME OF THE MANY ISSUES WHICH MR. NELSON MUST ADDRESS AS INS COMMISSIONER. IT IS OUR HOPE THAT THIS COMMITTEE WILL EFFECTIVELY MONITOR THESE AREAS AND ASK FOR PERIODIC PROGRESS REPORTS. TO BEGIN WITH, IT MUST BE RECOGNIZED THAT IN THE LAST SEVEN YEARS CONGRESS AND THE PUBLIC HAVE COME TO REGARD THE INS AS PRIMARILY AN ENFORCEMENT ENTITY RESPONSIBLE FOR ASSURING COMPLIANCE WITH U.S. IMMIGRATION LAW. WE HAVE BEEN ALL TOO CONCERNED WITH THE PUBLIC MANIA OF ANTI-IMMIGRANT/UNDOCUMENTED, THAT THE SERVICE FUNCTION OF THE INS HAS BEEN GREATLY NEGLECTED INTERNALLY AND CONSEQUENTLY HAS ERODED SIGNIFICANTLY. THIS EROSION OF PROVIDING SERVICES HAS CREATED MAJOR BACKLOGS WITH VISA APPLICATIONS AND HAS DEVELOPED THE PUBLIC PERCEPTION THAT INS IS ONLY IN EXISTENCE TO ENFORCE THE LAW AND NOT SERVICE THE NEEDS OF PEOPLE WANTING TO IMMIGRATE LEGALLY OR WHO HAVE A DESIRE TO BETTER UNDERSTAND THE IMMIGRATION LAWS OF THIS COUNTRY. DURING OUR MEETING WITH MR. NELSON HE ACKNOWLEDGED THIS TO BE A PROBLEM AND WAS IN AGREEMENT THAT THE PUBLIC MUST COME TO UNDERSTAND THE INS AS ALSO BEING A SERVICE AGENCY. WE ASK THIS COMMITTEE TO INQUIRE AS TO WHAT SPECIFIC EFFORTS CAN AND WILL BE UNDERTAKEN BY MR. NELSON TO CORRECT THIS SEVERE IMAGE AND RESOURCE PROBLEM. WE WOULD SUGGEST THAT MR. NELSON BE ALLOWED A REASONABLE PERIOD OF TIME TO DEVELOP A PLAN AND THAT HE REPORT BACK TO THIS COMMITTEE ON SUCH PROGRESS.

A SECOND ISSUE DEALS WITH THE KNOWN DIFFICULTIES THE INS HAS HAD IN DEVELOPING EFFECTIVE INTERNAL MECHANISMS TO MONITOR THE MOVEMENT OF NON-IMMIGRANTS ENTERING THE U.S. THE GENERAL ACCOUNTING OFFICE (GAO) ISSUED TWO REPORTS IN SEPTEMBER 1980 AND NOVEMBER 1980 INDICATING THE PROBLEMS INS ENCOUNTERS IN DEVELOPING AN INFORMATION MANAGEMENT SYSTEM CAPABLE OF ASSESSING THE MAGNITUDE OF THE PROBLEM, AND OF DEVELOPING A MECHANISM TO MAINTAIN AN UPDATED ENTRY AND EXIT CONTROL SYSTEM. PRIMARILY, THE PROBLEMS HAVE BEEN LACK OF RELIABILITY AND

TIMELINESS. AGAIN WE WOULD URGE THAT THIS COMMITTEE REQUEST OF MR. NELSON A SPECIFIC TIMEFRAME OF HOW AND WHEN IMPROVEMENTS WILL BE MADE AND IF IN FACT ADDITIONAL RESOURCES ARE NECESSARY.

A THIRD ISSUE DEALS WITH THE BACKLOGS ENCOUNTERED IN THE VISA APPLICATION PROCESS. WE HAVE FOUND THAT IT IS NOT UNCOMMON TO HAVE SOME APPLICANTS WAITING AS LONG AS 12 YEARS TO HAVE THE APPLICATION FOR LEGAL ENTRY PROCESSED. A SURVEY CONDUCTED BY U.S. NEWS AND WORLD REPORT FOUND THAT BACKLOGS, IN THREE REGIONAL OFFICES OF THE INS, OFTEN TIMES WERE UP TO SEVEN YEARS WITH MANY APPLICATIONS BEING EITHER MISPLACED OR LOST. IT IS SPECIFICALLY THESE DELAYS THAT HAVE CAUSED MANY WHO HAVE BEEN WAITING TO ENTER THE U.S. ILLEGALLY. IN VIEW OF THIS SIGNIFICANT PROBLEM WE WOULD AGAIN ASK THAT MR. NELSON DEVELOP A PLAN TO EFFECTIVELY ADDRESS THIS PROBLEM AND THAT HE REPORT BACK TO THIS COMMITTEE ON HOW INS INTENDS TO CORRECT THE SITUATION. THIS REPORT SHOULD CONTAIN INFORMATION ON WHETHER IT IS A MANAGERIAL PROBLEM, A LACK OF RESOURCES OR WHETHER U.S. IMMIGRATION POLICY HAS CREATED SUCH BACKLOGS.

ANOTHER ISSUE WHICH GREATLY CONCERNS US IS THE TENDENCY OF INS DISTRICT DIRECTORS AND OTHER FIELD PERSONNEL TO ACT INDEPENDENTLY OF INS HEADQUARTER DIRECTIVES. IT HAS BEEN OUR UNFORTUNATE EXPERIENCE TO ENCOUNTER MANY SUCH INS FIELD PERSONNEL WHO HAVE OVERZEALOUSLY APPLIED EITHER THE LAW OR DIRECTIVES FROM THE COMMISSIONER'S OFFICE. ALSO, WE HAVE ALL TOO OFTEN FOUND TIMES WHEN THERE IS VERY LITTLE COMPLIANCE WITH THE LAW AND DIRECTIVES BY FIELD PERSONNEL. CONSEQUENTLY, IT IS NOT SURPRISING TO FIND A DIFFERENT ACTION BEING TAKEN IN THE FIELD THAN THAT STATED BY INS HEADQUARTERS. AN EXAMPLE OF THIS OCCURENCE DEALS WITH THE CUBAN STOWAWAY, ANDRES RODRIGUEZ HERNANDEZ. THIS INDIVIDUAL WAS APPREHENDED BY INS PERSONNEL IN MIAMI AFTER HAVING STOWED AWAY ON A PANAMANIAN FREIGHTER STOPPING OVER IN HAVANA. AFTER BEING INTERVIEWED BY INS OFFICIALS AND BEING DESCRIBED AS A "USUAL POLITICAL ASYLUM CASE" HE WAS DEPORTED AT THE DECISION OF THE INS DISTRICT DIRECTOR AFTER CONSULTATION WITH A CIVIL SERVICE, NON-POLICY POSITIONED EMPLOYEE IN THE DEPARTMENT OF STATE. THIS ACTION SHOULD NOT HAVE BEEN TAKEN INDEPENDENTLY WITHOUT CONSULTING WITH DEPARTMENT OF JUSTICE AND STATE OFFICIALS. THIS WAS THE FIRST TIME IN 23 YEARS THAT SUCH ACTION WAS TAKEN AND HAS CONSEQUENTLY CREATED SEVERE

COMMUNITY RELATIONS PROBLEMS BETWEEN THE INS AND CUBAN-AMERICANS.

IT IS IMPERATIVE THAT SUCH INDEPENDENCE BE CONTROLLED SO AS TO ASSURE THE DISTRICT DIRECTORS ARE NOT MAKING OR INTERPRETING POLICY BUT EFFECTIVELY AND EFFICIENTLY IMPLEMENTING POLICY. IN THIS REGARD, WE WOULD ASK THIS COMMITTEE TO REQUEST OF MR. NELSON A PROPOSAL WHICH WILL OUTLINE A MECHANISM/PROCESS BY WHICH INS DISTRICT DIRECTORS AND FIELD PERSONNEL CAN BE MONITORED FOR COMPLIANCE WITH THE LAW AND INS DIRECTIVES.

WE OFFER OUR ASSISTANCE TO MR. NELSON AND THE INS IN WORKING WITH THEM TO MAKE IMPROVEMENTS IN THE AREAS WE HAVE SUGGESTED. IT IS OUR HOPE THAT CONSTRUCTIVE CHANGE WILL COME ABOUT.

Senator SIMPSON. That will conclude the hearing for today.

[Whereupon, at 4:22 p.m., the hearing recessed, to reconvene at the call of the Chair.]

BIOGRAPHIES

ROBERT H. BORK

NOMINEE, U.S. CIRCUIT JUDGE, DISTRICT OF COLUMBIA CIRCUIT

Birth: March 1, 1927, Pittsburgh, Pa.
Legal residence: Washington. D.C.
Marital status: Widower, Claire Davidson, 3 children.
Education: 1944—University of Pittsburgh; 1947-48—University of Chicago, B.A. degree; 1948-50, 1952-53—University of Chicago Law School, J.D. degree.
Bar: 1954—Illinois.
Military services: 1945-46, 1950-52—U.S. Marine Corps.
Experience: 1953-54—University of Chicago Law School, Law and Economic Project, Research Associate; 1954-55—Willkie, Owen, Farr, Gallagher & Walton, attorney; 1955-62—Kirkland, Ellis, Hodson, Chaffetz & Master, associate and member; 1962-73—Yale Law School, associate professor (1962-65), professor of law (1965-73); 1973-77—Solicitor General of the United States, Department of Justice; 1977-81—Yale Law School, Chancellor Kent Professor of Law (1977-79), Alexander Bickel Professor of Public Law (1979-81); 1981 to present—Kirkland & Ellis, partner.

MICHAEL S. KANNE

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF INDIANA

Birth: December 21, 1938, Rensselaer, Ind.
Legal residence: Indiana.
Marital status: Married to Judith Ann Kanne, 2 children.
Education: 1957-58—St. Joseph's College; 1958-62—Indiana University, B.S. degree; 1965-68—Indiana University, School of Law, J.D. degree.
Bar: 1968—Indiana.
Military services: 1962-65—U.S. Air Force.
Experience: 1968-71—Nesbitt & Fisher, associate; 1971-72—Private practice, Rensselaer, Ind.; 1972 to present—Judge, 30th Judicial District, Jasper County Circuit Court, Rensselaer, Ind.; 1976 to present—St. Joseph's College, lecturer, constitutional law.

JAMES T. MOODY

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF INDIANA

Birth: June 16, 1938, LaCenter, Ky.
Legal residence: Indiana.
Marital status: Married to Kay Gillett Moody, four children.
Education: 1956-57—Purdue University; 1957-60—Indiana University, A.B. degree; 1960-63—Indiana University School of Law, LL.B. degree.
Bar: 1963—Indiana.
Experience: 1963—Bank of Indiana, trust officer; 1964-72—private practice, Hobart, Ind., 1966-70—City attorney, East Gary, Ind.; 1964-73—City attorney, Hobart, Ind.; 1972-79—Superior court judge, Lake County, Ind., 1979 to present—U.S. Magistrate, Northern District of Indiana.

ALAN C. NELSON

NOMINEE, COMMISSIONER OF IMMIGRATION AND NATURALIZATION

Birth: October 18, 1933, Oakland, Calif.
Legal residence: California.
Marital status: Married to JoAnn Wallen Nelson, 3 children.
Education: 1951-55—University of California, B.S. degree; 1955-58—University of California School of Law (Boalt Hall), J.D. degree.
Bar: 1959—California.
Experience: 1958-64—Rogers, Clark & Jordan, San Francisco, Calif.; attorney; 1964-69—District attorney's office, Alameda County, deputy district attorney; 1969-72—State of California, Department of Human Resources Development, Sacramento, Calif., assistant director; 1972-75—State of California, Department of Rehabilitation, director; 1975-81—Pacific Telephone & Telegraph Company, San Francisco, Calif., attorney; 1981 to present—Department of Justice, Immigration and Naturalization Service Deputy Commissioner.

CONFIRMATION HEARING ON:

ELIZABETH A. KOVACHEVICH AND EUGENE F. LYNCH

FRIDAY, FEBRUARY 12, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:40 p.m., in room 2228, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Staff present: Vinton DeVane Lide, chief counsel; Duke Short, chief investigator; and Pamela Swanner, clerk.

The CHAIRMAN. The committee will come to order.

We have a hearing this afternoon for two Federal district judges. One is Elizabeth A. Kovachevich, if that is pronounced correctly, and the other is Eugene F. Lynch. Mr. Lynch is from California and Ms. Kovachevich is from Florida.

NOMINATION OF ELIZABETH A. KOVACHEVICH

Ms. Kovachevich, you might come around. Hold up your hand and be sworn.

Judge KOVACHEVICH. Yes, sir.

The CHAIRMAN. Do you swear that the testimony you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge KOVACHEVICH. I do.

The CHAIRMAN. Have a seat.

TESTIMONY OF JUDGE ELIZABETH A. KOVACHEVICH, NOMINEE, U.S. DISTRICT JUDGE, MIDDLE DISTRICT OF FLORIDA

The CHAIRMAN. Ms. Kovachevich, I believe you were born in Illinois.

Judge KOVACHEVICH. Yes, sir. That is correct, Mr. Chairman.

The CHAIRMAN. You decided to move to the land of sunshine. I believe you are single. You went to St. Petersburg Junior College, the University of Miami, and Stetson University College of Law. You were admitted to the bar in 1961 and you have been practicing since that time. Is that correct?

Judge KOVACHEVICH. That is correct, sir, until I assumed the responsibilities of a judge in 1973. We are not allowed to practice law after that date.

The CHAIRMAN. You are at present a circuit judge in the State of Florida?

Judge KOVACHEVICH. That is correct.

The CHAIRMAN. Is that the highest trial court down there?

Judge KOVACHEVICH. Yes, sir.

The CHAIRMAN. In my State the circuit court is the highest trial court.

Judge KOVACHEVICH. Yes, sir. That is correct, Mr. Chairman.

The CHAIRMAN. It has the power of death in criminal cases, and unlimited amounts in civil cases.

Judge KOVACHEVICH. That is correct, sir.

The CHAIRMAN. Therefore, you have now been nominated as a Federal district judge. Do you have any statement you would like to make?

Judge KOVACHEVICH. If I may, sir, I would like to reserve any comments until we finish and express my appreciation at that time.

The CHAIRMAN. All right.

Judge Kovachevich, you have served as a circuit judge with the Sixth Judicial Circuit of the State of Florida, I believe, since 1973.

Judge KOVACHEVICH. That is correct, Mr. Chairman.

The CHAIRMAN. Therefore, you are very knowledgeable of the State laws in that State, of course.

Do you foresee any difficulty in the transition from the State court to the Federal district court?

Judge KOVACHEVICH. No, sir, none whatsoever.

The CHAIRMAN. I would not think so, either. If I had been appointed a Federal judge when I was a State judge, I would not have seen any difficulty.

As a State court judge, you have primarily handled civil cases but you have handled criminal cases, too?

Judge KOVACHEVICH. Yes, sir. We have a rotation system, and I have rotated in and out of the adult criminal division three times. Primarily the last few years I have dealt with civil cases. I have indicated my preference to be in that particular division but there is no problem with my doing the criminal cases.

The CHAIRMAN. You have been involved in a number of television programs relating to the law, have you not?

Judge KOVACHEVICH. Yes, sir. I have previous experience with regard to that, both while I was an attorney and as a judge. I coordinated a project during the bicentennial celebration.

The CHAIRMAN. I believe you have produced and coordinated the television production, "A Race To Judgment." Is that correct?

Judge KOVACHEVICH. That is correct, sir. That occurred when I was an attorney.

The CHAIRMAN. This picture was nominated, I believe, for many national awards and was widely circulated in the State.

Judge KOVACHEVICH. Yes, sir.

The CHAIRMAN. Would you give us your opinion as to what you consider to be the pros and cons on the presence of television cameras in the courtroom?

Judge KOVACHEVICH. Mr. Chairman, at the present time the State of Florida allows the cameras in the courtroom by statute and by judicial interpretation by our supreme court. The main ob-

jective that any judge has is to see that a fair trial is held. I have had no problem with cameras in my courtroom, and I think that that is a direct result of the professionalism that has been displayed by the members of the journalism field in the way they have exercised their responsibilities.

Should any occasion occur where there is any prejudice that would occur in a case, I would not hesitate as a State circuit court judge to require that those cameras be removed but it is my feeling as a State circuit court judge that there is no difference whether you have one spectator or a million spectators because the courts are open for the people to be there to see what goes on.

Whatever the policy is and the law is in the Federal courts, I shall follow it.

The CHAIRMAN. I believe you do not have television now in the Federal courts.

Judge KOVACHEVICH. That is correct, sir. There is no television in the Federal courts at the present time, and that would be my policy. I would follow the law.

The CHAIRMAN. It is widely known that the State of Florida faces major problems involving the distribution of illegal drugs. Senator Hawkins, a very able Senator from Florida, is to be congratulated for her concern and foresight in creating a Senate drug enforcement caucus which is designed to serve as an informal, bipartisan forum which will share information and jointly seek solutions to the national problem of drug abuse.

The formation of this group is a start in the right direction. However, we must also have swift and just punishment for repeat offenders. I was just wondering, Judge, would you give us your views on the penalties that should be imposed on second- and third-time drug violators?

Judge KOVACHEVICH. The decision regarding those penalties, Mr. Chairman, belongs with the legislative body. I would suggest that if the penalties are severe enough the first time around, they will not be out to be repeat offenders the second and third time around. However, that is within your province and not that of the courts.

The CHAIRMAN. Are there ever any circumstances, Judge, where you would consider it appropriate to decide a case on some basis other than where the intent of the framers of legislation or constitutional provisions can be detected, either through the text of a provision or its surrounding legislative history?

Judge KOVACHEVICH. If I understand your question, sir, I think we are talking about separation of powers. I believe that the Constitution means what it says. I believe that the Constitution says that there are three branches of Government, and that the legislative body makes the laws, the executive body executes those laws, and the judicial body interprets those laws. If you have cooperative excellence among those three branches, each doing their job to the best of their ability, the intent of that Constitution is accomplished.

The CHAIRMAN. I have a letter here from Senator Hawkins which I will read into the record in your behalf. It was to have been her introduction if she had been here. She says:

I am especially pleased to have this opportunity to recommend most highly to this distinguished committee, Elizabeth A. Kovachevich, to be Federal District Judge for the Middle District of Florida.

I have known Elizabeth Kovachevich for many years. She will make an outstanding contribution to our Federal bench. She has the experience, the ability, and the character to meet the highest professional standards and responsibilities of a Federal judge.

Elizabeth Kovachevich has a long and impressive record of solid achievement. Let me cite just a few accomplishments: She was the valedictorian at St. Petersburg Junior College, first in her class at the University of Miami School of Business Administration, named Outstanding Woman of the Year, and stood second in her class at Stetson Law School. She has served on numerous prestigious commissions, such as the U.S. Department of Defense Special Advisory Committee on Women in the Services.

Have you been in service, Judge?

Judge KOVACHEVICH. No, sir, I have not been in military service.

The CHAIRMAN. "In 1972 she was elected circuit court judge for the Sixth District." Are the judges elected by the legislature down there?

Judge KOVACHEVICH. They are elected by the people. The term of office is a 6-year term. When I stood for reelection I had no opposition, and so I was elected again for another 6-year term.

The CHAIRMAN [continues reading]:

In her years as a judge, Elizabeth Kovachevich earned the highest respect of her peers. She has been consistently rated as one of the outstanding jurists of central Florida. She is viewed as a firm and fair judge with a strong reputation for thorough preparation and hard work. Her many fine accomplishments were formally recognized nationwide when she was nominated to the Federal bench in 1976 by President Gerald Ford.

You were nominated by President Ford but you were never confirmed by the Senate? Is that it?

Judge KOVACHEVICH. Sir, I never got a hearing. It has taken me 5½ years to get a seat front and center here, and as I have told people, this is the toughest ticket in this town for me to get. [Laughter.]

The CHAIRMAN. Well, we are glad to have you here today.

Judge KOVACHEVICH. Sir, I am glad to be here.

The CHAIRMAN [continues reading]:

Judge Kovachevich has given unselfishly to promote her idea of impartial justice for all. Her nomination to be U.S. District Judge for the Middle District of Florida is a tribute to her demonstrated integrity, and also a guarantee of fair-minded practice for the citizens of Florida. The swift approval of Judge Kovachevich's nomination by the Committee on the Judiciary and the full Senate will advance the interests of justice and strength in our judicial system.

That is a very strong introduction that the Senator would have given if she had been here, and I wanted that to be in the record.

Judge KOVACHEVICH. I am very grateful, Mr. Chairman.

The CHAIRMAN. Do you have anything you would like to say now?

Judge KOVACHEVICH. Mr. Chairman, I want to thank you, sir, for reading Senator Hawkins' introduction, and for your courtesy and consideration to me in this hearing today. I would like to express my appreciation to Senator Hawkins for her support; to President Reagan for his nomination; to the people at the Department of Justice and your staff, Mr. Short and his staff, and the other people who worked so hard to prepare all of the things that are necessary for these nominations and these considerations by the Senate. I would also like to express my appreciation to the American Bar Association for their efforts.

I am just very happy to be here, sir.

The CHAIRMAN. Well, Judge, we wish you happiness and success on the bench. From your past achievements and fine experience, we see nothing but success ahead for you.

Judge KOVACHEVICH. Thank you, sir.

The CHAIRMAN. We hope we can act on your nomination here and get you approved shortly so you can go right on the bench, on the Federal bench.

In 1976, what time of year were you nominated?

Judge KOVACHEVICH. June, sir, 1976, June 11.

The CHAIRMAN. Seventy-six?

Judge KOVACHEVICH. Seventy-six.

The CHAIRMAN. No action was taken on your nomination in 1976——

Judge KOVACHEVICH. No, sir.

The CHAIRMAN. Or 1977?

Judge KOVACHEVICH. Well, in 1976 there was an election that year, sir, as you might recall.

The CHAIRMAN. Oh, that is right. President Carter won in 1976.

Judge KOVACHEVICH. Yes, sir.

The CHAIRMAN. Evidently the Democrats did not want a Republican judge at that time. [Laughter.] But this time we will try to reverse the role.

If that is all, now, we will excuse you. Do you have any family with you that you would like to introduce?

Judge KOVACHEVICH. Mr. Chairman, I am here by myself but I want to assure you I am not alone. A lot of people are here with me in spirit.

The CHAIRMAN. Well, don't get lost in this big city.

Judge KOVACHEVICH. No, sir. I am going to try to get a plane and get out. [Laughter.]

The CHAIRMAN. All right. You are now excused.

Judge KOVACHEVICH. Thank you, sir.

NOMINATION OF EUGENE F. LYNCH

The CHAIRMAN. Our next nomination is Judge Eugene F. LYNCH. Will you come around, Judge?

Judge LYNCH. Good afternoon, Senator.

The CHAIRMAN. I will swear you in first. Just hold up your hand.

Judge LYNCH. All right.

The CHAIRMAN. Do you swear that the testimony you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge LYNCH. I do.

The CHAIRMAN. I understand Senator Hayakawa is out of town and could not be here but he supports your nomination. Senator Cranston, I understand, has sent in a blue slip approving you, too.

Do you have any family here you would like to introduce?

Judge LYNCH. I do, Senator. I have my wife.

The CHAIRMAN. Do you want to have her stand?

Mrs. Lynch, we are glad to have you. Do you have any children here?

Judge LYNCH. We have two children but they are home in school.

The CHAIRMAN. Thank you.

TESTIMONY OF EUGENE F. LYNCH, NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF CALIFORNIA

The CHAIRMAN. I believe you were born in San Francisco.

Judge LYNCH. That is correct.

The CHAIRMAN. You were educated at the University of Santa Clara with a B.S. degree; University of California, Hastings College of Law, LL.B. degree; and admitted to the bar in 1959.

Judge LYNCH. That is right, Senator.

The CHAIRMAN. You served 2 years in the Army, 1953 to 1955.

Judge LYNCH. That is right.

The CHAIRMAN. Since then, you practiced law until 1971 and then you became judge of the municipal court in San Francisco, and from 1974 to the present you have been a judge of the superior court of the State of California in and for the city and county of San Francisco.

Judge LYNCH. That is right, Senator.

The CHAIRMAN. Now is your superior court there the highest trial court?

Judge LYNCH. That is the highest trial court in the California system, the superior court.

The CHAIRMAN. Are they appointed by the Governor or elected by the legislature or elected by the people?

Judge LYNCH. They are elected by the people, and if there is a retirement or a resignation in the middle of a term, then the Governor appoints you. Governor Reagan appointed me to both the municipal and the superior court. I ran for reelection, unopposed, on two separate occasions.

The CHAIRMAN. Who was Governor when you were appointed?

Judge LYNCH. Governor Reagan.

The CHAIRMAN. Therefore, he has appointed you twice, then.

Judge LYNCH. Well, he has appointed me three times.

The CHAIRMAN. In other words, to the superior court there and then the Federal.

Judge LYNCH. That is right: the municipal court, the superior court, and now the Federal district court.

The CHAIRMAN. I have a few questions here I would like to propound to you.

Judge LYNCH. Surely.

The CHAIRMAN. Judge Lynch, I know that you have been a judge in the State of California for the past 10½ years. I am certain that you have witnessed a constant increase in the workload during this time.

Likewise, the workload of the Federal courts has increased steadily over the last two decades, and all concerned parties seem to agree that the trend will probably continue. Do you have any recommendations that might stabilize or decrease this workload?

Judge LYNCH. Well, Senator, I might say that in California we use the master calendar system, which is somewhat different than the Federal system where each judge handles his or her own calendar. In California and certainly in San Francisco, we have one

judge who makes the assignments on a daily basis or whenever you are free.

That certainly works well for us. We have had great success in the last 5 or 6 years in reducing the backlog but I think the thing that has worked best for us, particularly in the civil calendar where I am presently sitting, is the settlement conferences that we have scheduled in every civil case. Our practice has been to schedule them approximately 2 weeks before trial, have a judge preside over the conference. It is an informal conference. It is a judge different than the one who will try the case.

We have experienced great success with that. It has helped us reduce the civil calendar drastically and our criminal calendar presently is up to snuff. Of course, I think hard work on the part of the judges is the real key.

The CHAIRMAN. Judge Lynch, in reviewing your file I also noted that in 1978 you received the annual Judge of the Year award from the San Francisco branch of the Trial Lawyers Association.

Judge LYNCH. That is right, Senator. That was the first one they gave.

The CHAIRMAN. You are to be congratulated for being the first to receive this award, and I am confident that you are well thought of as a State court judge.

Now do you believe litigants in State courts receive the same level of fairness, due process, and quality of justice as do litigants in the Federal courts?

Judge LYNCH. In California I think that is certainly so, and I know of no other State where it would be different but I am not as familiar, of course, with other States as I am with my home State. I would think it is certainly true for California that we provide as good a system of justice as you would get in the Federal court.

The CHAIRMAN. Judge Lynch, in 1980 prisoner petitions comprised approximately 14 percent of all U.S. district court civil litigation filings. Various proposals have been made to limit collateral attacks on convictions, including additional requirements calling for complete exhaustion of State remedies, time limitations on the filing of petitions, and elimination of magistrates' authority to hold evidentiary hearings.

Now do you feel there is a need to alter the degree of access to Federal courts by State prisoners, and if so, what recommendations would you make in this area?

Judge LYNCH. Certainly I feel that a Federal judge has to be very, very careful and cautious in taking jurisdiction over these cases. For example, in California a prisoner, or rather a person charged with a crime, is arraigned by a municipal court judge. He then has a trial before a superior court judge.

He then has the right of appeal, with free counsel, to our appellate court where a three-person court reviews the conviction, reviews the record. He then has a right to appeal to our California Supreme Court, where seven judges review the conviction, so that by the time he has made a petition to the Federal court for a writ of habeas, 11 or 12 judges have been involved in the process.

Therefore, I think that before a Federal judge exercises jurisdiction he has to be very careful and very, very cautious, realizing

that at that time the man or woman has had his full panoply of rights.

The CHAIRMAN. I have instructed a bill to be prepared—I am not sure it has been introduced yet—that will limit this jurisdiction maybe to 3 years. What would you think of that?

Judge LYNCH. Well, Senator, I think there has to be an end to this constant appeal of crimes. If you have gone through your State appeal court level and through your State supreme court level, it is my opinion that unless something has gone awry, that that certainly has given you due process.

I think that one of the things I hear criticized most about the courts is the fact that 6 or 7 years later a conviction is overturned, that there seems to be a constant appeal with no end. I would favor some sort of end to the appellate process, providing, of course, that a person gets every right of due process.

The CHAIRMAN. A lot of times, by then the witnesses have moved away or died and it is impossible maybe to prove a case.

Judge LYNCH. It makes it virtually impossible after a long period of time to try to go back and reconstruct the case, I would think.

The CHAIRMAN. Judge Lynch, the phrase "judicial activism"—or as one judge down at the Williamsburg judicial conference 2 weeks ago called it, "judicial imperialism"—is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority. What does the phrase "judicial activism" mean to you, and do you consider yourself a judicial activist?

Judge LYNCH. First of all, Senator, I do not consider myself a judicial activist. I really favor the concept of judicial restraint. Our Constitution has three separate branches of Government—the legislative, the executive, and the judicial—and I think it is wrong for the judicial to get into the areas where the legislative branch or the executive branch properly should be.

I also feel that the job of a judge is to try the case before him and to give justice to the parties that come before him, and to decide the case on those merits.

The CHAIRMAN. Do you have anything else you would like to say, Judge?

Judge LYNCH. Senator, I would certainly like to thank you for your courtesy. I am very delighted to be here. I thank Senator Hayakawa, who recommended me to the President for nomination, and I certainly thank President Reagan for his nomination.

I would also like to take the opportunity to thank Mr. Duke Short and your staff. They have shown the utmost courtesy to me.

The CHAIRMAN. Well, we wish you much success and happiness on the bench. I do not know of a finer job than a Federal district trial judge, or any trial judge, a State court, even. To me it is next to practicing law, and that is probably the most ideal for a lawyer.

Judge LYNCH. I love my job. I was a trial lawyer and now I am a trial judge, and I am very, very excited about going on to the Federal bench.

The CHAIRMAN. The drama of the courtroom, I think, is unexcelled, and I certainly hope you enjoy your work.

Judge LYNCH. Thank you very, very much, Senator.

The CHAIRMAN. We are glad to have you here.

Judge LYNCH. Thank you, sir.

The Chairman. I believe that ends the hearing for today.

[Whereupon, at 3:15 p.m., the committee recessed, to reconvene at the call of the Chair.]

BIOGRAPHIES

ELIZABETH A. KOVACHEVICH

NOMINEE, U.S. DISTRICT JUDGE, MIDDLE DISTRICT OF FLORIDA

Born: December 14, 1936, Canton, Ill.

Legal residence: Florida.

Marital status: Single.

Education: 1954-56—St. Petersburg Junior College, A.A. degree; 1956-58—University of Miami, B.B.A. degree; 1958-61—Stetson University College of Law, J.D. degree.

Bar: 1961—Florida.

Experience: 1961—Pinellas County legislative delegation, research and administrative aide; 1961-62—DiVito & Speer, associate; 1962—Rieck & Fleece Builders Supplies, house counsel; 1962-73—Private practice, St. Petersburg, Fla.; 1973 to present—Circuit judge, sixth judicial circuit, State of Florida.

EUGENE F. LYNCH

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF CALIFORNIA

Birth: December 2, 1931, San Francisco, Calif.

Legal residence: California.

Marital status: Married to Jeanne M. Glynn Lynch, 2 children.

Education: 1949-53—University of Santa Clara, B.S. degree; 1955-58—University of California, Hastings College of the Law, LL.B. degree.

Bar: 1959—California.

Military service: 1953-55—U.S. Army.

Experience: 1959-71—O'Connor, Moran, Cohn & Lynch (formerly O'Connor, Moran & Cohn), San Francisco, Calif., associate (1959-64), partner (1964-71); 1971-74—Judge, municipal court, San Francisco, Calif.; 1974 to present—Judge, superior court, city and county of San Francisco.

CONFIRMATION HEARING ON:

LEROY J. CONTIE, JR., ROBERT B. KRUPANSKY, JOHN R. GIBSON, AND CLARENCE M. PENDLETON, JR.

FRIDAY, FEBRUARY 26, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 11:15 a.m., in room 4232, Dirksen Senate Office Building, Senator Charles E. Grassley (acting chairman of the committee) presiding.

Present: Senators Grassley, DeConcini, and Specter.

Staff present: Duke Short, chief investigator; Bill Christensen, investigator; Allan Spence, investigator; and Pamela Swanner, clerk.

NOMINATION OF LEROY J. CONTIE, JR., ROBERT B. KRUPANSKY, JOHN R. GIBSON, AND CLARENCE M. PENDLETON, JR.

Senator GRASSLEY. This hearing to consider nominations to the courts and to the Commission on Civil Rights is called to order.

Today's hearing is on the nomination of Leroy J. Contie, Jr., and Robert B. Krupansky to the sixth circuit court of appeals, John R. Gibson to the eighth circuit court of appeals, and Clarence M. Pendleton, Jr., to be Chairman of the Civil Rights Commission.

Our usual procedure, which we are going to depart from, would be to hear from the Senators from the individual States in conjunction with the judges who have been nominated from that individual State. But because my colleagues are under time constraints, we will hear from the Members of Congress and the Senators in support of the particular nominees, and we will then hear from the nominees later.

In the order of the consideration of the judges, I will call on the Senators and Congressmen, in that order. First will be my colleague from Ohio, Senator John Glenn.

STATEMENT OF HON. JOHN GLENN, A U.S. SENATOR FROM THE STATE OF OHIO

Senator GLENN. Thank you, Mr. Chairman. It is always an honor and a privilege to appear before the Judiciary Committee, and I am especially pleased to be here this morning to join in introducing Leroy J. Contie, Jr., and Robert B. Krupansky, who are seated right behind me, to you and to the other members of the committee.

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I am very enthusiastic about their nominations to the sixth circuit court, not only because they are fellow Ohioans, but also because I believe that they are eminently qualified for the position. Each man has built an outstanding record as a judge and as an attorney, and each man has demonstrated the dedication and the commitment necessary to carry out his new responsibilities.

For the past 10 years, Leroy Contie has served with distinction as U.S. district judge for the northern district of Ohio. A native of Canton, Ohio, Leroy earned both his bachelor's degree and his law degree from the University of Michigan. But since neither Senators Riegle nor Levin are members of this committee, I guess I am safe in revealing that to his everlasting credit, Judge Contie has nevertheless remained a loyal follower of the Ohio State football team during these years, and let me add, it is one more indication of his commonsense and good judgment, I would consider.

After joining the Ohio bar in 1948, Leroy entered private practice with the Canton law firm of Contie & Contie, an association he kept for the next 20 years. Between 1952 and 1959, he found the time to also serve as city solicitor for Canton. In 1969, he was elected to the Stark County Court of Common Pleas, where he served until his appointment in 1971 to the district court.

Bob Krupansky is a native of Cleveland, Ohio, and received both of his college degrees from Western Reserve University in that city. He, like Judge Contie, served in the Army during World War II and has had extensive legal experience in both the public and private sectors.

He has served as assistant attorney general for the State of Ohio, as director of Ohio's Department of Liquor Control, and won election to a term as judge of the Cuyahoga County Court of Common Pleas. In 1969, Judge Krupansky was appointed U.S. attorney for the northern district of Ohio, and the following year was named U.S. district judge for the same position, and he has served admirably in that position for the past 10 years.

Mr. Chairman, both Judge Contie and Judge Krupansky are very honorable men who have served with distinction. They have served their country and their communities well, and I recommend them most highly and believe that they will continue their outstanding work on the Federal bench and urge the committee to swiftly confirm their nominations. Thank you.

Senator GRASSLEY. Thank you, Senator Glenn.

Senator Metzenbaum?

STATEMENT OF HON. HOWARD M. METZENBAUM, A U.S. SENATOR FROM THE STATE OF OHIO

Senator METZENBAUM. I am very happy to be here today to recommend the confirmation of both Judge Contie and Judge Krupansky. These are two unusual men. In many ways their records are somewhat parallel. Both of them were appointed to the Federal district bench, one in December 1971 and the other in 1970. They have been known as the workaholics of the Federal bench. I think they have been known to work late into the night, and on weekends as well.

They have great reputations in the areas in which they serve, as well as nationally. They are particularly well qualified, both from experience as well as from legal background. I think that I can sum it all up by saying that in the case of Judge Contie and Judge Krupansky, probably the worst thing I can say about them is that they are Republicans instead of Democrats. With respect to Judge Krupansky, I could say something probably far worse, and that is that for about 10 years of his life he was my law partner in the firm of Metzenbaum, Haynes, Krupansky, Findley & Stern.

Other than that, I think they should be confirmed to this position, and they will serve with great credit to all of us.

Senator GRASSLEY. Thank you, Senator Metzenbaum.

I now call on Congressman Ralph Regula, from the State of Ohio, a former colleague of mine in the U.S. House of Representatives. Welcome to the Senate side.

STATEMENT OF HON. RALPH REGULA, A U.S. REPRESENTATIVE FROM THE STATE OF OHIO

Mr. REGULA. Thank you, Senator. It is a pleasure to see one of my former colleagues from the House presiding over a Senate committee, and I am pleased to be here and speak in support of the nomination of Federal Judge Leroy Contie, Jr., to the sixth circuit court of appeals.

I have known Judge Contie for many years. He is a respected judge and a great credit to the legal profession. Importantly, he also has been a leader in the Stark County community in many social and charitable activities.

I am quite confident, Mr. Chairman and members of the committee, that you are familiar with Judge Contie's professional background. Therefore, I will not discuss this in my testimony. I do welcome an opportunity to relate some information you may not have.

Leroy Contie, Jr., is regarded as hardworking. He is known as a judge who is on the bench and on the job. As a district Federal judge, he has kept his docket current. He maintains one of the lowest backlogs on his docket among the Federal judges in Ohio. At the present time, he has but one criminal case pending, and I think in today's world it is important to keep justice swift as well as fair because it is an important element.

He has not had a practice of plea bargaining sentences in his court. He has been direct in responding to issues, and he has not been ambivalent in his decisions on issues involving interpretations of the law. He has recognized fully that the responsibility of the judiciary is to evaluate the law and not to legislate. His actions as a Federal judge have been consistent with the separation of powers that is fundamental to our system of government. He has been endorsed by the bar association for every election or appointment he has ever sought. During his tenure on the Federal bench, Judge Contie has acquired a reputation for being tough but fair.

In my judgment, he will be a distinguished member of the sixth circuit court of appeals and would be a credit to the Federal judiciary.

Senator GRASSLEY. Thank you, Congressman Regula.

I now call on Senator Eagleton from Missouri in regard to the appointment of Judge John R. Gibson to the eighth circuit court of appeals.

Senator EAGLETON. Mr. Chairman, I would yield to my colleague.

Senator GRASSLEY. Thank you very much.

Senator Danforth?

STATEMENT OF HON. JOHN C. DANFORTH, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator DANFORTH. Mr. Chairman, thank you very much. This is the second time in the last year, I guess the last 9 months or so, that Judge Gibson has appeared before this committee. He was nominated by the President to be a district judge in the western district of Missouri, and as I recall, his confirmation hearing was some time last summer. He was sworn in as a district judge in October.

Prior to his nomination by the President, he went through a selection process in which some 33 applicants for district judge were reviewed by a panel of 5 outstanding citizens. They, in turn, sent names to me for consideration, and John Gibson was one of three recommendations that I sent on to the President for district judge in the western district of Missouri.

Before going to the bench, he had a long history as a trial lawyer in Kansas City. He was a member of a well-known Kansas City law firm, Morris & Hecker. He is also a past president of the Missouri bar, and a past president of the Kansas City Bar Association. Also, he has served as vice president of the board of police commissioners in Kansas City and as chairman of the drafting committee of the Jackson County Charter Commission.

His reputation was widely held throughout the western part of the State, in particular as one of the finest trial lawyers in the State of Missouri. He truly knows how to try a law suit. All of the reports that I have heard about him since he was sworn in as a district judge have been outstanding.

Therefore, it is with great enthusiasm that I recommend the confirmation of John Gibson.

Senator GRASSLEY. Thank you, Senator Danforth.

Now Senator Eagleton.

STATEMENT OF HON. THOMAS F. EAGLETON, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator EAGLETON. Thank you, Mr. Chairman. I wish to echo the recommendation of my colleague, Senator Danforth. Judge Gibson is one of the most respected lawyers in western Missouri, in the entire State of Missouri, a man of impeccable reputation and credentials. I recommend him to this committee unreservedly and unqualifiedly. Thank you, Mr. Chairman.

Senator GRASSLEY. Thank you, Senator Danforth and Senator Eagleton.

Now it is my pleasure to call upon my colleague, Senator Hayakawa, from California, in regard to the nomination of Clarence Pendleton to the Commission on Civil Rights.

STATEMENT OF HON. S. I. (Sam) HAYAKAWA, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator HAYAKAWA. Thank you, Mr. Chairman and members of the committee. It is my privilege today to introduce Mr. Clarence Pendleton, President Reagan's nominee for Chairman of the Civil Rights Commission. Mr. Pendleton is sitting at my right.

Senator GRASSLEY. Welcome, Mr. Pendleton.

Mr. PENDLETON. Thank you.

Senator HAYAKAWA. The Civil Rights Commission was formed in 1947 for the purpose of focusing attention on civil rights violations and injustices against the disadvantaged. Clarence Pendleton would bring the experience necessary to guide the Commission successfully.

In the same year that the Civil Rights Commission, then called the Civil Rights Committee, came into being, Clarence Pendleton was a student in the segregated Dunbar High School of Washington, D.C., in the days when that school was a beacon of Negro intellectual achievement.

Mr. Pendleton joins a distinguished group of Negro judges, military officers, educators, political leaders, and authors who graduated from that high school in its halcyon days. Then he graduated from Howard University with a bachelor of science degree in physical education in 1954, the year of the Supreme Court decision on *Brown* v. *the Board of Education* in Topeka. He completed his master's degree in education there in 1962.

Mr. Pendleton's professional experience reflects, in addition to considerable administrative expertise, an ability to work well with individuals. Between 1958 and 1970, he worked in recreation, first as an instructor and coach at Howard University and later as recreation coordinator for the Model Cities agency of Baltimore.

In 1970, Mr. Pendleton became the urban affairs director for the National Recreation and Parks Association, and from 1972 to 1975 he was director of San Diego's Model Cities department. Today, Clarence Pendleton is active in the San Diego community, where he is president of the San Diego Urban League and two of its subsidiaries. His leadership has revitalized the local urban league, while confirming his dedication to achieving civil rights for all Americans.

Mr. Chairman, I have known Mr. Pendleton by reputation for some time, but it was only last week that I had the pleasure of meeting him in person, in California. I am honored, Mr. Chairman, to present him to the committee at this time.

Senator GRASSLEY. Thank you, Senator Hayakawa.

The Chair now will call, one at a time, to the witness table the nominees as they are on the agenda. The first nominee is Judge Leroy J. Contie of Ohio, to be circuit judge of the sixth circuit court of appeals.

Judge, before you make your statement would you have members of your family that you would like to introduce to the committee?

Judge CONTIE. Yes. My wife is present.

Will you please stand?

Senator GRASSLEY. Thank you very much, and welcome here.

Would you proceed with any statement you would like to give?

TESTIMONY OF JUDGE LEROY J. CONTIE, JR., NOMINEE, U.S. CIRCUIT JUDGE, SIXTH CIRCUIT COURT OF APPEALS

Judge CONTIE. First, I wish to express my gratitude to the President, for the support that I have received from Senators Glenn and Metzenbaum, and also my gratitude that I received the unanimous endorsement of all the Republican Congressmen of the State of Ohio. By way of special recognition, I want to give thanks to Congressman Regula and Congressman Ashbrook.

I am proud and humble to be here today, and I am overwhelmed by the fact that my service as a district judge may in some way have brought me to this level. I want to express my gratitude to the present Members of the Senate and the Members of the Senate 10 years ago when I was confirmed as a district judge. It has been a rewarding experience. I have enjoyed the trial work, and I will definitely miss the clash in the arena.

In the event that my qualifications merit your approval, I pledge to you that I will work as industriously as a circuit judge as I did as a district judge. I further pledge that I will conduct myself by high ethical and judicial standards. I further pledge that I will not be an activist for any cause. And I further pledge that I will know the bounds of my duties; I will be sitting as a judge on a reviewing court, and I will not be a legislator or an administrator.

I humbly request the confirmation of my nomination, and I want to say that I am deeply proud to have the privilege of being here today.

Senator GRASSLEY. Thank you, Judge. I have some questions I would like to ask you, and also Senator Specter is here, and he may have some, too.

Judge Contie, having served as a judge in the common pleas court from 1969 through 1971, and then as a U.S. district court judge for the past 10 years, I am certain that during this period you have witnessed a constant increase in the workload of the court. All concerned parties seem to agree that this increase will probably continue.

Do you have any recommendations that you might have to stabilize or decrease the workload?

Judge CONTIE. Positively. The basic premise I have is that I think when I serve as a judge, as much of my time should be spent in judging and sitting on the bench.

Now, there are problems with the workload and taking care of the work in the back room. Federal judges need more backup staff. We have the same number of clerks that Federal judges had 20 or 25 years ago. My function, I think, solely should be as a judge that hears many cases in the court, but who can go in the back room and have the research completed and the cases laid out, and then you make a determination and write memos. But I think that courts are restrained somewhat in not being able to do this from lack of staff and having to do a lot of the back room work. I think the case load could be tremendously reduced.

There are other ways, such as in my operation, where I have backup cases. I have several people standing by, and not definite assignment dates, but I do not think that can be controlled by legislation. But I think, on the bottom line, judges need more backup

staff so they can spend more of their time sitting on the bench, judging.

Senator GRASSLEY. Thank you, Judge. Again, I would like to ask your views. In 1980, we had prisoner petitions comprising 14 percent of all U.S. district court civil litigation files. Various proposals have been made to limit collateral attacks on convictions, including requirements calling for complete exhaustion of State remedies, time limitations on filing of petitions, and eliminating magistrates authority to hold evidentiary hearings.

Do you feel there is a need to alter the degree of access to Federal courts by State prisoners; and if so, what recommendations in this area would you make to us?

Judge CONTIE. I think there is a definite need to assert some control. First of all, time limitation is a must. Prosecutors, people who respond to these complaints, are placed at a disadvantage because sometimes you are going back 12 or 15 years when a trial took place that an individual is complaining about. Time limitation is a must.

There is a second factor. We receive petitions that you cannot understand what anyone is driving at. I think that there should be some sort of a system to require solely that they be put in writing. In a lot of cases, after a tremendous amount of time is spent in hearings and inquiry and transporting the individual around, on the bottom line you find their claim to be frivolous. If they were compelled to write out everything they are claiming, and have that go through a preliminary review, you can tell—anything they want to tell you, write it out; all their testimony written—I think you could separate the wheat from the chaff and find those cases that are frivolous that do not require any more time.

Senator GRASSLEY. Thank you, Judge. I have another question. In your answering the committee's questionnaire concerning actions in your professional and personal life which evidence your concern for equal justice under the law, you reply in part, and I quote:

> In the criminal field, I am one of the ever-decreasing number of judges who does not plea bargain. There are no back room dealings or bargains in my criminal cases. Back room plea bargaining sessions can lead to judgment calls being tempered by factors which lead to unequal application of justice. I avoid any out-of-court discussions with lawyers who represent criminal defendants that may be suspect of influence peddling.

You are to be commended, I can say, for your action. However, are there ever any circumstances where you would consider plea bargaining an acceptable alternative?

Judge CONTIE. The bottom line, in a short answer, should be no. I do not think that I should be called upon as a Federal judge to sit down and deal with the attorney for a suspect bank robber or a suspect dope peddler or a suspect person that is selling automatic guns and machine guns. A bargain is a one-way street; it is to reduce the sentence.

If it were possible to get a total presentence report, an accurate presentence report prior to the time of motion pleas—There are times when this is currently provided, but the defendant does not want to sit down and totally reveal his soul to the presentence department. There are thousands upon thousands of people who are employed in the United States as part of a presentence department

who can turn around and thoroughly acquaint the court with the background of the individual, to research the background of the individual.

How can I make a snap judgment before I have that report? As I say, there are present methods where, if a person consents to obtain that report, but you can never get the total statement of the defendant. Of course, the statement cannot be used in court, but his friends clam up in places where the inquiry is made. It is not an accurate report.

Before that report is in the hands of any judge, I do not know how he conceivably is grabbing into space to determine the man's background. I have had instances where somebody says, "Oh, my man or woman, the defendant, is clean; they haven't any criminal record." I say, "Well, we'll wait and see." I look at the record when it comes in, and in one case I had 26 criminal matters. Some of them were felonies reduced to misdemeanors, but they said, "I thought you only meant felonies. I didn't think misdemeanors counted." It is news to me if misdemeanors do not count in society.

The bottom line answer is no.

Senator GRASSLEY. Thank you. My last question you have alluded to in your opening statement, and we appreciate it very much, but we still would like to ask specifically in regard to the phrase "judicial activism." This is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority. What does the phrase "judicial activism" mean to you, and do you consider yourself a judicial activist?

Judge CONTIE. Let me answer the latter part first. I positively am not a judicial activist.

The term means to me that in the event that I find that a police department is discriminating in regard to hiring, I should make an order regarding elimination of the discrimination, but I should not make orders to run the entire police department. In the event that I find that a bank or an industry is discriminating against individuals for race or sex, I should make orders to correct the employment practices, but I should not try to make orders to expand and run the business. I should not seek out class actions where class actions are not apropos. Also, in cases where I find there is discrimination in the school system, I should arrange the appropriate order, whether it is opening or closing of other schools or whether or not busing is appropriate, but I should not make orders as to who the superintendent of schools is or how his office should be run or how many assistants they have or I should not run the entire school system.

This is what "judicial activism" means to me, in bringing a lawsuit and expanding far beyond the bounds of what totally is the issue.

Senator GRASSLEY. Thank you, Judge. I have no further questions. It could be that you might expect some questions in writing from other members of the committee who cannot be here. That does not happen very often, but if it does, we would appreciate your response in writing. Thank you very much.

Judge CONTIE. Thank you very much for the privilege.

Senator GRASSLEY. Once again, congratulations on your appointment.

I would call the next judge, Judge Robert B. Krupansky of Ohio, to be circuit judge for the sixth circuit court of appeals.

Would you have members of your family that you could and would want to introduce to us and to the audience as well?

Judge KRUPANSKY. I regret, Senator, that I am here alone.

Senator GRASSLEY. Would you proceed with your statement then, if you have one.

TESTIMONY OF JUDGE ROBERT B. KRUPANSKY, NOMINEE, U.S. CIRCUIT JUDGE, SIXTH CIRCUIT COURT OF APPEALS

Judge KRUPANSKY. I really have no statement, Senator, beyond the point of expressing my gratitude to the President for his nomination, to this committee for its consideration, to the Senators for taking the time out of their busy schedules to be here to introduce me, and of course to the innumerable people, staff support, who have taken part in the investigations and preparations necessary for these hearings.

Senator GRASSLEY. I have four questions I would like to ask you. Judge, you wrote in an American Bar Association article, and I quote: "More and more frequently I hear lawyers and judges suggesting radical revisions of the discovery and pretrial provisions of the Federal Rules of Civil Procedure. They say the system is not working, and we must try something altogether new."

You have disagreed with these suggestions and have stated that you feel the existing procedures can work well and be effective. Would you please give the committee your reasons for this belief?

Judge KRUPANSKY. Yes, Mr. Chairman. Those conclusions derive from a 5½-year case study in docket control and docket administration. I found that the Federal rules of civil procedure provided more than an adequate vehicle for economic and expeditious disposition of legal matters pending before my court.

I found that the key rested in a proper implementation of the rules, rather than the rules themselves. The keys were, first of all, active vesus passive judicial control of all litigation coming before the court, from its inception to its conclusion; second, the instilling of a sense of urgency in counsel by fixing an early trial date for all litigation coming before the court. Needless to say, the demanding regiment and discipline was demanding both upon the judge as well as the lawyers; however, the results were good. It provided for the parties before the court, on the one hand, to have a speedy trial, together with thorough pretrial preparation. For the court, it provided an expeditious way of moving its docket.

I think that these conclusions are well confirmed by the statistics. I was able, over this 5½-year period to reduce an initial docket of some 380 cases that ranged from 9 years in age down to 1 year in age, with an average life of 2 to 4 years. That was supplemented each month by an additional 31 new cases, or 60 percent. Perhaps more significant was the fact that of the remaining cases, 79 percent were less than 3 months old or 90 days, and only 1 percent were above 1 year. Needless to say, I found that it was an answer to providing a speedy trial.

Senator GRASSLEY. Thank you. A question has arisen concerning your ruling in the case of Clyde Kuebler versus Cleveland Lithog-

raphers and Photo-Engravers Union, Local 24-P. Would you please explain this case to the committee and give us your reasons for finding in favor of the union?

Judge KRUPANSKY. Yes, Mr. Chairman. As closely as I can determine at this late date, that was a matter that, like all other cases, was assigned to me not by choice but by random draw. It was assigned to me some 10 years ago, and I believe it was in March of 1972 the matter was docketed for trial on March 22, of 1972, and it was a hearing on a preliminary and permanent injunction, where the member of that particular union was seeking to enjoin the union from imposing certain sanctions in the form of, I believe, a fine in the amount of $2,000 and a 90-day suspension resulting from alleged misconduct in the form of undermining the union's negotiation committee in its efforts to resolve a protracted strike.

The entire hearing before me was concluded in a matter of less than an hour and a half. That is the period of time that it took counsel for both sides to present their witnesses and their argument.

The plaintiff in that case, namely the union member, charged, among other things, that the union had deprived him of procedural due process. He alleged that he was not, in the first instance, notified of the nature of the charges against him; second, that he was deprived legal representation before the lay hearing board; third, that the hearing board was biased and prejudiced against him; fourth, that the charges were not formally executed against him; and last, that he was refused certain documentation that had been utilized during the course of the hearing before the union's internal affairs committee for purposes of appeal.

At the conclusion of all of the evidence, I did what I generally do; attempt to confine and limit the issues to the evidence that was joined by the pleadings and introduced during the course of the trial. I also felt that it was a case that fell squarely within the pronouncements of what at that time had been a recently rendered decision by the Supreme Court in the case of Brotherhood of, I believe it was B.P.I.S. & H. against Hardeman, wherein the Court announced that in all matters affecting the internal affairs and operations——

Senator GRASSLEY. For the record, could I say that it was the International Brotherhood of B.I.S.B.F. & H.

Judge KRUPANSKY. Thank you, Senator. Those letters were confusing to me.

In any event, I felt that as a result of the pronouncements of the Supreme Court in that decision, which incidentally was handed down some few months before my decision in 1972, that I was mandated from looking into and considering the weight of the evidence that was presented before the initial hearing board; and second, that if the record disclosed—and I believe the language of the Supreme Court was—any evidence, however slight, that would support the conclusions of the union hearing board, the reviewing court or the district court was foreclosed from interfering or substituting its judgment for that of the initial hearing board.

I regret to say that the court of appeals for the sixth circuit disagreed, and upon considering the weight and sufficiency of the evidence that had been introduced before the hearing board, which I

felt I was foreclosed from doing, reversed and remanded the matter back to me.

Thereafter, in accordance with the mandate of the court of appeals, I issued an order reinstating the plaintiff to full union membership, expunged the record as to all proceedings against him, expunged the fine, expunged the suspension, and ordered full restitution of his lost wages.

I might say, Senator, that in that case and in every case that appeared before me subsequent to that case, as well as the cases that came before it, I attempted in my best judgment——

Senator GRASSLEY. You had to initiate some contempt proceedings against the union in regard to this, too?

Judge KRUPANSKY. Yes, I threatened contempt proceedings. However, I believe when those contempt proceedings were threatened, the appropriate individuals saw the light and the matter was resolved. The sanctions were not imposed, because there was no necessity to impose them.

As I started to say, I endeavor in all of my administrations to seek out the truth and to correctly apply the law. I believe that I have followed that philosophy throughout my judicial career, fairly, impartially, without prejudice, and without bias as to any party that has ever appeared before me.

Senator GRASSLEY. In summation, then, Judge, you then felt constrained by Supreme Court precedent and decided the case in favor of the union, primarily on procedural grounds?

Judge KRUPANSKY. That is absolutely correct.

Senator GRASSLEY. I would like to enter a letter that the committee has from Richard H. Siegel, who was trial counsel for the plaintiff, into the record in toto. But I would also like to quote, for the benefit of this hearing, this sentence from Mr. Siegel's letter:

> Although I did not agree with Judge Krupansky's decision in this case, the fact remains that his handling of the entire matter was unquestionably fair, evenhanded and beyond reproach. No narrowly based interest group should be permitted to obscure the fact that Judge Krupansky has been a distinguished trial lawyer and that he is eminently qualified to serve on the United States Court of Appeals for the Sixth Circuit.

[Material referred to follows:]

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February 23, 1982

Duke Short, Chief Investigator
Senate Judiciary Committee
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Washington, D. C. 20510

Re: Kuebler v. Cleveland Litographers and Photo-engravers Union Local 24-P, et al.
United States District Court Case No. C72-225
Sixth Circuit Court of Appeals Case No. 72-1490

Dear Mr. Short:

I have recently had an opportunity to read a mailing issued by the National Right to Work Committee on January 18, 1982, in which its membership was urged to oppose the pending nomination of United States District Court Judge Robert Krupansky to the United States Court of Appeals for the Sixth Circuit. It is my understanding that the National Right to Work Committee's position against Judge Krupansky's appointment is based entirely on the Decision he rendered against the plaintiff in the above-captioned litigation.

As trial counsel for the plaintiff in this lawsuit and as the lawyer who successfully appealed Judge Krupansky's adverse ruling to the Sixth Circuit Court of Appeals, I want you to know that I consider the position taken by the National Right to Work Committee to be patently unjustified and without merit. Although I did not agree with Judge Krupansky's Decision in this case, the fact remains that his handling of the entire matter was unquestionably fair, evenhanded and beyond reproach. No narrowly based interest group should be permitted to obscure the fact that Judge Krupansky has been a distinguished trial judge and that he is eminently qualified to serve on the United States Court of Appeals for the Sixth Circuit.

Thanking you for the opportunity to bring this information to your attention, I am

Very truly yours,

Richard H. Siegel

RHS:mk

Senator GRASSLEY. I have a new question now. What are your views on the primary purpose of the criminal justice system?

Judge KRUPANSKY. Senator, that is a question that has, in recent days, evoked a great deal of discussion and commentary from penologists, sociologists, jurists, legislators, and the public at large. I believe that a common consensus that has surfaced as a result of these discussions has been that the simplistic approach of punishment as a deterrent versus rehabilitation, as it has been approached traditionally, has not rendered successful results.

If my recollection serves me correctly, only recently the Chief Justice Burger himself, I believe in his comments on the state of the judiciary, has addressed this issue and suggested that new and innovative approaches must be taken in this area which presents, at least in the minds of many, a potentially explosive area. I am confident, Senator, that as a result of this great interest in the recognition of the problem itself will result in the not-too-distant future in innovations beyond the traditional approaches that we have heretofore taken in these areas.

Senator GRASSLEY. Judge, what do you feel will be the most rewarding aspect of serving as circuit court judge, rather than in your present capacity on the district court?

Judge KRUPANSKY. Mr. Chairman, I believe it will offer an opportunity for me to participate more directly in the formulation of judicial policy and judicial administration, where I believe I have some experience and perhaps ideas that could be effective; and secondly, and perhaps more importantly, it will permit me to more directly participate in the formulation of stare decisis and the establishment of legal precedent.

Senator GRASSLEY. Thank you, Judge Krupansky. I want to thank you for your testimony in answering our questions and also make you aware of the fact that you can probably expect some questions in writing from members of the committee who were not able to be here, and we would appreciate your prompt response to those questions. Thank you very much.

Judge KRUPANSKY. Thank you very much.

Senator GRASSLEY. Just a minute. Senator DeConcini, I am sorry.

Senator DECONCINI. Thank you, Mr. Chairman. I will be very short.

Judge Krupansky, I am very impressed with your statements and your past experience as a judge and attorney, and I compliment the administration on the appointment. I can assure you that I think you will see speedy action on your appointment.

Judge KRUPANSKY. Thank you very much, Senator.

[Responses of Judge Krupansky to queries of Senator East follow:]

RESPONSES TO SUPPLEMENTARY INTERROGATORIES
OF THE SENATE COMMITTEE ON THE JUDICIARY
AT THE REQUEST OF THE HONORABLE JOHN P. EAST
(R) SENATOR FROM THE STATE OF NORTH CAROLINA

1. In Kuebler v. Cleveland Lithographers & Photoengravers Union Local 24-P, 489 F.2d 1023 (6th Cir. 1973), a union member sued his union challenging the propriety of the union's internal discipline of allegedly improper actions by the member. In your opinion holding for the union, you state that the Court would not substitute "its judgment for that of the union in matters of internal union discipline without an affirmative showing of arbitrary and discriminatory action by the union or its officers." This suggests that you would accord a union similar deference to that accorded governmental entities. Do you believe that unions should be considered in legal disputes as clothed with authority of law?

Governmental and various other entities, including labor unions, are clothed only with that legal authority which is delegated by constitutional, legislative and/or executive mandate. In the context of adversary litigation, the rights, duties and privileges of a labor union are primarily determined by the will of Congress as manifested in its legislative enactments and as such labor unions possess no special status in the eyes of the court. In the limited area of internal union disciplinary proceedings -- the subject matter of Kuebler v. Cleveland Lithographers & Photoengravers Union, Local 24-P, Case No. C72-225 (N.D. Ohio 1972) -- the intent of Congress, demonstrated by the remarks of Senator Kuchel on the Senate floor prior to enactment of the Labor-Management Reporting and Disclosure Act, was to permit intra-union disciplinary action providing there is "the usual reasonable constitutional basis" for such action. The Supreme Court of the United States, in International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers v. Hardeman, 401 U.S. 233, 91 S.Ct. 609 (1971), relied upon by the trial Court in Kuebler and constituting prevailing legal precedent, held that this "constitutional basis" exists if there is "some evidence", however slight, to support the factual findings of the union disciplinary board. Accordingly, this Court's reluctance, in Kuebler, to substitute its findings of fact for those of the executive board was

based on the legislative intent of Congress as identified by the Supreme Court in a decision binding upon this District Court. Moreover, the limited scope of review authorized by Hardeman is consistent with the broader policy of judicial restraint which manifests itself in the proper reluctance of federal courts to encroach on the inner workings of a variety of entities, including for example, municipalities, federal or state agencies and private corporate bodies.

2. In Penthouse Intern. Ltd. v. Putka, 436 F.Supp. 1220 (D.C. Ohio 1977), a magazine publisher sought a preliminary injunction to enjoin enforcement of a concession agreement between the city and the concessionaire which operated a news stand at the airport. The agreement limited the sale of plaintiff's magazine. Judge Krupansky, your opinion held that the city by acting without a prior hearing exercised an unconstitutional prior restraint and you granted plaintiff's injunction. Do you believe that the First Amendment prohibits local government from enforcing standards of decency in the distribution of magazines and other literature?

> It is beyond dispute that the First Amendment to the United States Constitution does not foreclose a State or municipality from prohibiting the dissemination or exhibition of obscene materials. This, of course, follows from the fact that obscenity is simply not, under the First Amendment or otherwise, entitled to constitutional protection. Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957).
>
> A State or municipality may therefore, consistent with the guarantees of the First Amendment, regulate obscene materials in "the exercise of its traditional local power to protect the general welfare of its population". Miller v. California, 413 U.S. 15, 32 n.13, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). The governing authorities would indicate, however, that the States' altogether legitimate interest in proscribing the sale and distribution of obscene materials must be effectuated in a manner consistent with the standards enumerated in Miller v. California, as well as the procedural safeguards outlined in Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965) and Southeastern Promotions,

Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), the latter of which this Court was duty-bound to follow and apply in the case to which the instant inquiry refers, to wit: Penthouse International, Ltd. v. Putka, 436 F.Supp. 1220 (N.D. Ohio 1977).

3. In construing the Constitution, should a judge interpret language in accordance with the intention of the framers or should he interpret language in accordance with more recent political and social theories?

The central and overriding principle of constitutional construction is to faithfully discern and give effect to the intent of the framers. As is more fully developed in response to question #5, the responsibility for Constitutional interpretation is primarily committed to the Supreme Court.

Where the intent is not clearly ascertainable or where issues arise not contemplated by the framers, the amending process exists whereby a fundamental consensus may be conclusively established.

4. What role does contemporary political thought and social theory play in the judicial function? What role do you think it should play?

The implementation of contemporary political thought and social theory is, under our constitutional scheme, essentially a legislative function, appropriately reserved to and performed by duly elected representatives after an opportunity for careful deliberation and debate. Inasmuch as the function of the judiciary is, in our democratic society, the administration of justice and not the governance of the people, the courts must scrupulously avoid legislation by judicial decree. Stated differently, the proper discharge of a lower court's judicial duties and responsibilities requires that the tribunal follow and apply the law as it has been enacted by the legislative branch and authoritively construed by the United States Supreme Court, and assiduously refrain from resolving legal issues or fashioning relief in a manner which, by design or otherwise, simply implements the jurist's own political and/or sociological views. I am in accord.

5. Is the Constitution what the document says or what the latest Supreme Court decisions say it says? What is the proper role of stare decisis in constitutional law?

Article III, Section 2 of the United States Constitution extends the judicial power to all "cases" and "controversies" arising under the Constitution and further vests in the Supreme Court appellate jurisdiction both as to law and fact, with such exceptions, and under such regulations as the Congress shall enact. Accordingly, the framers established as a fundamental precept that the responsibility of construction and interpretation of the principles and embodiments of the Constitution is vested in the judicial power, with the Supreme Court, except as congressionally limited, as the supreme appellate authority. Axiomatically, any district or appellate court interpretation of a constitutional provision must be in congruence with that enunciated by the supreme appellate authority established in Article III.

It is incumbent upon the Supreme Court to discharge its responsibility of constitutional construction in such a manner as to effectuate the principles and embodiments of this fundamental document. Since this responsibility is a continuing endeavor, any failure on the part of the Supreme Court is rectifiable. Furthermore, in those instances where the Supreme Court has, in discharging its duties and responsibilities, drawn attention to a need for constitutional modification, resort may be had to the amendment procedure prescribed in Article V.

6. Before Dred Scott, were blacks incapable of becoming citizens of the United States? Were they after Dred Scott?

The Fourteenth Amendment conclusively removed race as a barrier to citizenship and the equal protection of the law. This amendment resolved the interpretive controversy existing among the Supreme Court in the case of Dred Scott v. Sandford, 19 U.S. 393 (1857) and between various State courts. See Common-

wealth v. Ames, 18 Pick. (Mass.) 193 (1836); Mitchell v. Wells, 37 Miss. 235 (1859); Lemmon v. The People, 20 N.Y. 562 (1960).

> The conflicting judicial opinions preceding the adoption of the amendment, including the nine widely diverse positions argued in the 248 published pages of Dred Scott, and the social upheavals resulting therefrom, evidenced the inability of the courts to clearly resolve a complex issue which ultimately required the broader consensus embodied in the amending process, as envisioned by the framers.

Senator GRASSLEY. I would now like to call to the witness table Judge John R. Gibson of Missouri to be circuit judge for the eighth circuit court of appeals.

Do you have any members of your family or anybody else whom you would like to introduce to the committee and to the audience?

Judge GIBSON. Yes. My wife, Mary Elizabeth, is here in the back, and an old law school classmate, Bill Leedy. We attended law school some 30 years ago.

Senator GRASSLEY. Welcome back to the committee. I think I was here when you were here the first time.

Judge GIBSON. I think you were, Senator.

Senator GRASSLEY. Do you have a statement that you would like to make at this time?

TESTIMONY OF JUDGE JOHN R. GIBSON, NOMINEE, CIRCUIT JUDGE, EIGHTH CIRCUIT COURT OF APPEALS

Judge GIBSON. Senator, I am very humble with the nomination the President has forwarded for the post on the court of appeals for the eighth circuit, and I certainly appreciate the President's consideration in forwarding that nomination. I am appreciative of this committee in scheduling this hearing so promptly after that nomination. I am very grateful that both Senator Danforth and Senator Eagleton were here to make their comments.

I view the role of the judge as one who decides specific controversies that come before him, and in my short tenure on the district bench I have attempted to fulfill that function. I have filed substantial material with the committee, and with that short statement I am simply open to any questions the committee has.

Senator GRASSLEY. I have a few questions. Obviously, the committee is aware of the fact that you were recently confirmed for the position of district court judge for Missouri, and now in a short period of time you have been nominated to a higher position on the eighth circuit court of appeals. Do you feel that the short time that you have spent as a district court judge will be of value to you in your new position; and if so, how?

Judge GIBSON. I do, Senator. Of course, I think we should realize that in the makeup of the court of appeals, probably somewhere between a third and one-half of the judges on those courts have never

served on a district court. I do not have the lengthy experience that the two judges who just appeared here have. But in only 5 months, I can see really two ways that it will help me.

As a lawyer engaged in litigation, I felt that I handled a very wide range of types of cases, but I was absolutely amazed at the great diversity of cases that come before a district judge, and of course those same cases go through the appellate system. So I think one is an appreciation of the great diversity of work that is done. Second, a district judge sits in a very hot seat. I think if you are reviewing the work of a district judge, as the court of appeals does, it is helpful to appreciate the pressure that judge is under, the haste with which some of the decisions must be made, and the entire nature of the process that is being reviewed. I think in those two ways it will be very helpful.

Senator GRASSLEY. Thank you. The last time you appeared before the committee, you were asked your views on second and third offense drug dealings. In light of your recent service on the district court, would you reiterate those views to the committee at this time?

Judge GIBSON. I have to say first that in my 5 months on the district bench I have not yet had a drug case come before me. But I think this is a most serious problem in our society, and I think those who are repeat offenders in this very serious area should be dealt with very vigorously when they are proved to be guilty.

Senator GRASSLEY. Do you feel that U.S. magistrates are properly utilized, or should they be given a greater role in our judicial system?

Judge GIBSON. They are utilized in many different ways in the various districts. They can play an extremely vital role. In our area, we have two. One handles almost all of the pretrial aspects of the criminal docket, and the cases really come to the district judge for the first time when they are fully prepared, an omnibus hearing held, testimony taken on any pretrial motions, and the case is ready to go. As a result, our district has encountered no difficulty at all in keeping well ahead of the deadlines of the Speedy Trial Act. Of course, in civil cases, these judges can do a great deal. We have not used them as much to supervise some limited aspects but actually to try a given number of cases. They certainly can provide a tremendous amount of help to the district court, which has a serious personnel problem all over.

Senator GRASSLEY. You responded to a portion of the committee's questionnaire on the question of judicial activism, and you stated this: "The court should interpret the laws and Constitution as required by the case before it, recognizing the proper constitutional role of the legislative bodies to determine questions of public policy." Could you elaborate on this point, and particularly, did you as a district court judge have difficulty in carrying out that premise that you stated?

Judge GIBSON. Senator, I did not. As I stated in my opening remarks, I think it is the judge's duty to decide a case on the facts of that case that come before him and on the law. Of course, the judge by his oath is to render justice fairly and impartially and to decide the case on the evidence and the law, agreeably to the Constitution and laws of the United States.

A judge who is appointed for life, I feel, should not enter into the areas of establishing broad public policy. I think that elected representatives, who are subject to election every 2 years or every 6 years by the electorate, are the proper individuals to engage in that result. The judge should decide the cases, and he should have the independence to do so, but the broad policy decisions should be left with the legislators, and the court should recognize the appropriate spheres of activity as outlined in our Constitution.

Senator GRASSLEY. Thank you, Judge. I have no further questions.

Do you, Senator DeConcini?

Senator DECONCINI. Mr. Chairman, thank you.

Judge, first let me compliment you on your short but successful tenure as a U.S. district judge. Although I did not hear your two Senators from Missouri, I have talked to one of them and he speaks highly of you.

Judge Gibson, do you feel there is a role for judicial tenure board or tenure procedure within the judiciary to handle complaints against judges?

Judge GIBSON. I think it is desirable that there be some mechanism by which complaints can be considered. I think those processes have been put into place in our State system in Missouri.

Senator DECONCINI. Does Missouri have such a system?

Judge GIBSON. Yes, the State of Missouri has.

Senator DECONCINI. Does it work well, in your judgment?

Judge GIBSON. It has worked very, very well. Of course, many of the complaints are groundless, but some have been quite serious.

Senator DECONCINI. At least it gives a feeling that there is some relief if an individual has a complaint?

Judge GIBSON. Yes, I think it does.

Senator DECONCINI. Do you think that such a system, assuming it could be constructed in a constitutional manner, is proper at the Federal level?

Judge GIBSON. I think, of course, how it is structured falls more in the realm of concern of this body rather than as judges. I think one reads the Federalist Papers and one realizes how important the independence of the judiciary is. But still, for areas that may involve going beyond the powers and going beyond what should be done and misconduct, I think those procedures are very important.

Senator DECONCINI. Assuming it is constitutional, independent, and does not infringe on the court, you would have no philosophical problem with it?

Judge GIBSON. I think it is hard to envision specifics when we are talking generally. But, I think, if it is structured properly and constitutionally, I think it will work.

Senator DECONCINI. We passed the Judicial Tenure Act, which is a very loosely structured procedure solely within the court system.

Judge GIBSON. Yes.

Senator DECONCINI. How do you feel about that act?

Judge GIBSON. I think the structure that has been created this time is functioning in a satisfactory way.

Senator DECONCINI. Thank you, Judge, very much.

I have no further questions, Mr. Chairman. Thank you.

Senator GRASSLEY. Thank you, Senator DeConcini.

Judge Gibson, there are no further questions, but we would ask you to respond very quickly in writing if you get questions by that method. Thank you very much, and congratulations on your promotion.

Judge GIBSON. Thank you, Senator.

Senator GRASSLEY. The Chair will now call Mr. Clarence M. Pendleton, Jr., of California to be a member of the Commission on Civil Rights.

Do you have any members of your family or anyone else that you would introduce to the committee and to the audience?

Mr. PENDLETON. Yes, thank you, Mr. Chairman. I have my son and older daughter here, George Pendleton and Susan Pendleton, who attend school in Washington, D.C.

Senator GRASSLEY. Thank you, and welcome to the committee. Would you proceed with any statement you have before we ask you questions?

TESTIMONY OF CLARENCE M. PENDLETON, JR., NOMINEE, CHAIRMAN, U.S. COMMISSION ON CIVIL RIGHTS

Mr. PENDLETON. Mr. Chairman, I want to thank you and the committee for the opportunity of appearing here today. I am indicating to you that I am proud and happy to be President Reagan's nominee to chair the U.S. Civil Rights Commission.

It is imperative that the Commission work for the civil rights of all Americans, and I pledge my support to that effort. That completes my opening comments, and I look forward to and am prepared to answer any questions you may have.

Senator GRASSLEY. Members of the committee and Mr. Pendleton, I have a letter here I want to enter in the record. It is a letter of support of your nomination from these Congressmen: Bill Lowery, Clair Burgener, and Duncan Hunter. So, without objection, that will be entered into the record.

[The letter referred to follows:]

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., February 26, 1982.

Senator STROM THURMOND,
Committee on the Judiciary,
Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR THURMOND: As members of the San Diego Congressional delegation, we unanimously support the confirmation of Mr. Clarence Pendleton, Jr. as chairman of the U.S. Civil Rights Commission.

His background is one of exemplary service to his community and to enhancing the opportunities for all Americans whether they are black, brown or white. Within our community, he is a leader in the commitment to equal rights while emphasizing the responsibilities of self-determination and personal achievement.

In Mr. Pendleton's successful tenure as President of the San Diego Urban League since 1975 he has shown aggressive, creative approaches to solving problems in the minority community. His efforts are also marked by great diversity as the attached list of affiliations demonstrates. His determination to foster equality spans such crucial areas as housing, transportation, employment. and education.

There is no doubt in our minds that Mr. Clarence Pendleton is qualified to be an excellent chairman of the U.S. Civil Rights Commission. We urge you to act favorably on his nomination.

Sincerely,

BILL LOWERY,
CLAIR BURGENER,
DUNCAN HUNTER,
Members of Congress.

Senator GRASSLEY. I have questions, and I am sure other members of the committee have questions besides. As well, you perhaps could expect questions in writing, and we would appreciate your quickly responding to those in writing.

Mr. Pendleton, recent news reports about Armed Forces' educational testing of young Americans have stressed the poor performance of blacks as a group, as compared to others, on those tests. For many years, you have helped young people overcome the handicap of poor education and other problems to get jobs and to enter the mainstream of society. It looks like that remains a very large job. What should we be doing differently in order to make sure that young blacks are able to fully take advantage of the opportunities in our society?

Mr. PENDLETON. There is no doubt in mind that education is one of the most important roads or vehicles to equal opportunity in this country, and it is imperative that all Americans and particularly those of us in the black community make a conscious, concerted, and dedicated effort to making certain that our students learn and that our schools teach. It is also important that the Commission begin to look forward to that effort and make recommendations and conduct whatever studies are appropriate, to assist communities and to assist individuals to make certain that our kids get a quality education.

Senator GRASSLEY. Mr. Pendleton, many blacks have reported that the worst problems facing their communities are crimes and drug-related problems. Does the Commission on Civil Rights have a role to play in such issues; and if so, what priorities would you give to those problems, in terms of assisting the black community to forge ahead?

Mr. PENDLETON. I would certainly think, Mr. Chairman, that if that issue comes before the Commission, and there are those who believe that the civil rights of Americans are being violated in these areas, that we need to look carefully at drugs and crime in our communities. Certainly, I would not place the matter about drug usage in priority over, necessarily, just crime; I think one tends to beget the other. I am certain that if those issues come before us, we will handle them expeditiously.

Senator GRASSLEY. Mr. Pendleton, the administration has been emphasizing regulatory reform as a way of opening business opportunities for small businessmen and women. Black economists like Thomas Sowell and Walter Williams have focused on the need to lessen regulatory burdens and costs in order to allow minority entrepreneurs to enter the market. Do you believe the Commission on Civil Rights should be involved in this issue, and do you think that deregulation in areas like transportation can help minorities to advance economically?

Mr. PENDLETON. Yes. I do think that the Commission has done some work in this area. I recall reading about the Commission's work in holding hearings in Baltimore, Md., where there was only about 1 to 2 percent of minority communities that had been able to avail themselves of business opportunities. I do support the views of Mr. Sowell and Mr. Williams with respect to regulatory relief.

In the San Diego area, we have been very instrumental in providing approximately $62 million in primarily minority business loans in the county. It would certainly be helpful to us if the regulatory process were abated somewhat or relieved somewhat, so that it would allow us to process those loans much quicker. Those loans are a combination of the various SBA programs and an effort by the private business sector to cooperate with us.

With respect to regulatory relief in employment, the Urban League of San Diego operates what was known as the Philadelphia Plan, under Executive Order No. 11246. We had been able to use that effort to employ over 5,000 minorities and women into the work force in San Diego. The problem with it is the regulatory process and the auditing and the regulatory process in carrying out the act that inhibits our small staff of four people from doing the job much more effectively.

We think that the labor unions and the various contractors and the various trades have complied with the order well on a voluntary basis, but we could certainly do much more if the regulatory burden were relieved somewhat.

Senator GRASSLEY. The next question deals with your coordination of activities with the 50 State advisory commissions on civil rights. As chairman of the U.S. Commission on Civil Rights, how would you propose to coordinate the activities of these State commissions, and how will you implement recommendations received from these commissions and the overall policy of the Commission on Civil Rights?

Mr. PENDLETON. I think the answer to the question is one of guidance, in terms of being able to look at what is already on the docket for the Commission and being able to collect the information from the various advisory councils, and working with the fellow commissioners in setting up a priority of those activities that need immediate attention and those that probably do not need it so quickly. And hopefully, by that process, we would be able to move forward with the various recommendations from advisory councils.

Senator GRASSLEY. Your record of achievement for the black community as San Diego's Urban League director is one which I am sure you are proud of. You have, for example, had a great deal of success in getting jobs for minorities in San Diego. In this regard, what were the greatest obstacles you encountered, and how did you effectively overcome these obstacles?

Mr. PENDLETON. The greatest obstacle was getting those who wanted to hire residents from the minority community to understand that we had quality minority applicants—and, for that matter, quality majority—clients. We had been able to attract job announcements to our agency. We have cooperated well in the CETA program, especially the private sector initiative program.

We think that the regulatory barriers in some parts of CETA are an impediment. We do think that some of the statutory requirements from CETA are, in a sense, an impediment. However, we have worked dilligently with that and a small staff and have convinced the employer community that we have quality employees. They believe that, and I just commend my staff for an awful lot of hard work and an awful lot of time being spent in mixing and matching employee with employer.

Senator GRASSLEY. Those are all the questions I have. I will call now on Senator DeConcini.

Senator DECONCINI. Thank you, Mr. Chairman.

Mr. Pendleton, I would like to welcome you here today. I also would like to thank Senator Thurmond, the chairman of the Judiciary Committee, for setting up these hearings and Senator Grassley for chairing them. All of this was done on very short notice, and I commend them for their expeditious handling of it.

Mr. Pendleton, I am impressed with your credentials and experience in the civil rights area. I am impressed by personal recommendations I received from your community. Your background in the Model Cities program and the Urban League in San Diego gives you the credentials for the Civil Rights Commission that I am sure we will find very hard to match with other nominees.

I believe it is important for members of the Commission, especially the chairman, to understand the concerns and fears of those who look to the Commission for protection and guidance and concern. After talking with you, I am sure that your views on civil rights fully reflect those of the President.

What does concern me is the message that your appointment sends to minority people in the United States. I understand that you believe that there are alternatives to the methods we have used in the past to assure that civil rights are protected. In many cases, for instance, the use of quotas in hiring and school admissions, I happen to agree with you that we must find and can find alternatives.

What I would like to discuss and to ask you some questions about is your commitment to civil rights and the Commission. I want to be able to assure those in this country who rely on the Commission that you will be working on their behalf; and even though they might disagree with your methods, that you are committed to protecting those civil rights.

On November 28, 1981, there was an article in the New York Times in which you were quoted as stating with regard to affirmative action, and "Whatever the administration's policy is in this respect, I have no choice but to support that policy which must come up through some previous advice."

Does this way of conducting business conflict with what might be the foundations of civil rights and the Civil Rights Commission? Can you give me an explanation? Let me tell you why I am concerned about that statement. It seems to me that it is not just the administration's policy. It is the policy of Congress. It is also the law of the land decided by the Supreme Court, which the Civil Rights Commission is, I think, duty bound to follow, even if you and I happen to serve on it and do not agree with that. Can you elaborate on your statement, please?

Mr. PENDLETON. Certainly. The statement is a little bit out of context. I was indicating that if there is policy already on the book, I would have no choice but to follow that policy. I do think that is is important that the Commission work, as I mentioned earlier in my testimony, for the civil rights of all Americans. It is important that we collect the best set of information we possibly can and give to the Congress and give to the President the best advice that we can as a Commission to make certain that the policy does work for

all Americans. It is important that people around the country avail themselves of the Commission's hearings and avail themselves of the Commission's existence to let us know exactly how they feel about issues, and let us put those issues together and move those recommendations forward as rapidly as possible, in the best form we possibly can, so that we can move the course of civil rights in this country the way it should be moved.

Senator DECONCINI. Let me pose a hypothetical. Let us assume Congress legislated and mandated a quota system, and although the administration happened to disagree with it, it became the law of the land. What would your position be?

Mr. PENDLETON. Well, the law of the land is the law of the land. From my own point of view, I am opposed to quotas. I think that they do not help us, and I would much rather not see them. But if Congress, in its wisdom, sees fit to legislate that, certainly we would have to carry out the law of the land.

Senator DECONCINI. That answers my question. I join you in that I am opposed to quotas, and I am opposed to forced busing. Unless Congress reverses the Supreme Court on busing, it is the law of the land. The Commission has supported busing because of that. Your testimony indicates to me that notwithstanding your personal objections, you would follow the law of the land. I think that is all that we are asking of you. I hope Congress will alter some of the decisions that I happen to disagree with, such as forced busing.

Your comments in People magazine's article of January 11, 1982, in response to questions regarding your relationships with and views of national black leaders and their reservations about your nomination appears to indicate some conflict. How would you describe your overall relationship with such individuals? What impact, if any, would this have on your duties as chairman of the Commission?

Mr. PENDLETON. I would answer your last question first. The Commission is open to everyone, and I think the testimony that is brought to the Commission is not decided by me as chairman but certainly by the full Commission. I only serve in a leadership or convening capacity.

I, too, was appalled by some of the comments that I read and heard about my position on civil rights issues. I think it is important to say here that I only know of one civil rights leader, so designated, who has ever taken the opportunity to call me and ask me what my views are. I read what my views were, in various forms, in the media and was surprised.

I must indicate to you that I am one who sincerely believes that preparation and competence prepare one to take his place in the social order more than anything else. I do believe that for Blacks and other minority Americans, sometimes that is not enough. Especially where we have quality and qualified people for school admissions and for jobs, race needs to be a factor taken into consideration.

I would hope that at some point the black leadership would at least convene or have me convene with them so that we could quickly discuss where I am and maybe where they are. I do not see us being on opposite sides of the fence. I do see us looking at some different ways of handling the civil rights issue.

And finally, I do not think there is a monolithic way among black people of handling civil rights, and I am certain that there are many people in this country with the opportunity, and I would hope they would use the Commission as that opportunity, to present an alternative point of view that at some point might present a different discourse, and perhaps from negotiation of the two positions we can come up with a product.

Senator DECONCINI. Mr. Pendleton, I am very pleased with that response and, quite frankly, surprised at the fact that you have not been contacted. Have you been contacted by any other minority groups and asked your views on civil rights or specific issues?

Mr. PENDLETON. I have not been contacted by national minority groups, in a sense. I have received letters from local groups in San Diego and have received calls of support. But from a national perspective, I think it is important to say that Dr. Joe Lowery from SCLC did call me one night to discuss some matters that he thought were important, prior to his having a news conference the next day. It is important that I let you know that, and I thank Reverend Lowery for his interest and for his call. It was a good discussion, and I think that we understand each other a lot better now.

Senator DECONCINI. Mr. Pendleton, the position of chairman of the U.S. Civil Rights Commission is one of the most important and significant appointments that the President can make. I think the Civil Rights Act of 1964, the Voting Rights Act, the U.S. Civil Rights Commission and the Commission's continued involvement in civil rights are cornerstones of what has moved this country in a positive way to minimize discrimination and problems.

I am very pleased with your candor, your background, and with the commitment that you have. I feel you have not only demonstrated your knowledge and ability in this area, but you have demonstrated that you are a doer and a responsive person who does not shut the door on anyone. I compliment you for that and for your willingness to take this job. I am pleased to see you here today. I do not think it is going to be an easy job. You are going to have all kinds of pressures and demands, both from minorities and others, to step out on certain issues. I feel you have the character and background to make those judgments and not back away from anything. I am pleased to have your nomination before this committee.

Mr. PENDLETON. Thank you.

Senator GRASSLEY. Thank you, Senator DeConcini.

Now Senator Specter, from the State of Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Pendleton, a question which Senator DeConcini posed to you I think is a very fundamental one. He quoted from the article which appeared in the New Youk Times, where you are quoted as saying: "Whatever the administration's policy is in this respect, I have no choice but to support that policy, which must have come up through some previous advice."

You said that was taken out of context. And then you said, as I made notes: "If the policy is on the book, then the Commission must follow it."

The Commission, as I understand the law, is an independent agency with the Commission to use its own judgment. There was a very forceful exchange between Senator McClellan and Senator

Eastland, then chairman of the Judiciary Committee, during hearings back in 1958 considering the nominations of a number of people to the newly created Civil Rights Commission, and I think it is worth referring to it.

Senator McClellan said, "This Commission * * *," referring to the Civil Rights Commission, "* * * when established, becomes its own boss. I do not think anybody has any authority to call you in to give you instructions." Father Hesburgh replied to Senator McClellan, "I did not know that, sir." Senator McClellan said, "I think you ought to know that. I thought this was to be an independent commission." Chairman Eastland noted, "That was the congressional intent, but you know those things are forgotten at times." Then Senator McClellan said, "I did not know that there was any question about that. I did not know anyone had any idea that someone could give them instructions what to do."

Is it your understanding, that the Commission is independent?

Mr. PENDLETON. Yes, it is, Senator.

Senator SPECTER. That being so then, I take it that you would exercise your own judgment in an independent way?

Mr. PENDLETON. Yes; I would.

Senator SPECTER. So that you would listen to the President or listen to even a Senator or to citizens or citizen groups, but in the final analysis we may be assured, I take it, that you will regard your position as one of independence and exercise the judgment in the final analysis as you see it?

Mr. PENDLETON. Yes; I would. I would say to you, as I indicated to Senator DeConcini when we talked about policy in the administration, I was really referring to things that are already in place. If there is a need to change things and the people of this country need to use the Commission to talk about changing what policy might be in effect, it had nothing to do with that. I regret the implication that I would take instructions from the administration; that I would not do, and I reiterate to you my statement that I do understand that the Commission is independent, and we would have to work hard to change what is already on the books.

I think it is also important to say that if the Commission made those recommendations before and they are policy, we must understand that those recommendations were made by a previous commission, and that their work went into that in a dilligent way. History rolls us up a different set of circumstances on some things, and it is important to change. In the change process, I would like to assure you that I understand the Commission's independence and will work forthright with my fellow commissioners to make certain that we maintain that independence and again to give you the quality information that the Congress and the President need to make civil rights law and civil rights policy in this country.

Senator SPECTER. I am glad to hear you say it in just that way, and I think that is really the important point. You should consider the precedents, but you have a responsibility, as you just noted, on historical change. The Commission ought to be balanced and the Commission ought to be wise. But if it has had one characteristic which is probably the most important one, it is the independence of the Commission: that the Commission should exercise its own judgment, weighing the factors as it sees them.

Mr. PENDLETON. I would concur.

Senator SPECTER. The duties of the Commission are spelled out in the federal statute, which was enacted in 1957. Section 1975(c) says:

> The Commission shall . . . (a)(3) appraise the laws and policies of the Federal Government with respect to discrimination or denials of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin or in the administration of justice.

What is your own view of how activist the Commission ought to be in being, so to speak, an advocate for equality.

Mr. PENDLETON. The Commission has to be an advocate for equality, just like I am. I have been an advocate for a long number of years, I guess some 51 now, from the time I recognized there were some differences between people's color and the ways they were treated. The Commission has to be an active voice and be very vocal in looking into and making recommendations about the status of civil rights in this country.

I do think it is important to say to you that I think civil rights in some cases transcend racial rights. In fact, there are other issues that come up that are civil that do not leave themselves purely in a racial context. It could be that the Commission has to look into those areas, too. I would suggest to you two areas.

One is the matter of zoning of land in this country. That is a clearcut civil rights issue, to my way of thinking, and I might want to suggest that at some point to my fellow Commissioners. I think the whole matter of regulatory relief, as was brought up by Senator Grassley, is an area that certainly begins to impact the civil rights of people in this country. There could be things at a State and local level, where they might not be very Federal issues, that we could ask the advisory councils to look into or get information from local groups as to what they think are clear civil rights issues.

The reason I say that is that this transcends, if you will, the mere characterization that the Civil Rights Commission only deals with racial issues. They are important issues, they are fundamental issues, and some of the civil issues come from those that are racial.

So I would like to assure you that I intend to encourage my colleagues to make certain that we are an extremely active Commission and also to make certain that the information that we send forth to the administration and to the Congress is of such quality that you would have little suspicion about its content and would certainly be able to transform that the way you see proper into law.

Senator SPECTER. I think you are certainly correct. The statute which I have just read covers quite a number of items beyond race and color.

Moving on down the line on the issue of religion, have you taken a public position on tax benefits for schools, like Bob Jones University, which has been alleged to have discriminatory practices?

Mr. PENDLETON. Yes; I have, Senator. I, along with some other colleagues of mine, made it known to the White House how we felt about that.

Senator SPECTER. How do you feel?

Mr. PENDLETON. I am opposed to any tax-exempt status for those schools that discriminate. Certainly I would feel appalled if the mi-

nority or racial communities in this country were called upon to spend their tax dollars to support that.

I let the White House know in a mailgram to Mr. Meese that I thought this was wrong, I was appalled by the action that was taken, and also indicated that I did not care what personal cost this might be to me but that I could not and would not support a policy that did this, and that I thought it was politically and morally destructive. I did, fortunately and happily, receive a phone call from the President on Tuesday morning—following the decision date—expressing his real concern about the issue. He was concerned about my interest in it. We had about a 7-minute phone conversation, and I sincerely believe that this President will take all the steps necessary to eliminate tax-exempt provisions for those schools that discriminate.

Senator SPECTER. I would not trespass on your conversation with the President but for your having brought it up. I will ask you one followup question, which I advise you in advance you have a privilege, not necessarily a right, not to answer.

Did he express general agreement with your position?

Mr. PENDLETON. Yes, he did.

Senator SPECTER. Moving on down the line, the next matter to be protected is the item of sex. What is your view of the women's rights issue, focusing particularly on pay for women, on the widespread allegation that women in similarly situated positions do not receive comparable pay to that given to men.

Mr. PENDLETON. There is evidence to that, and I would hope that the Commission in its work could address that issue, if it has not already done so. I am not familiar with all the Commission's work. But certainly from my point of view, I would support equal pay for equal work.

Senator SPECTER. The next categories in sequence are the aged and the handicapped, frequently forgotten as having specific mention in the Civil Rights Act. I have seen that with some forcefulness. My wife, Joan Specter, is a member of the Philadelphia City Council. She has introduced an ordinance on the issue of age and handicap. Do you have any feel for that issue, as its enforcement might come to the Commission?

Mr. PENDLETON. Certainly you can understand that southern California, especially San Diego, has a large senior citizens community. Since I have been in San Diego some 10 years, the senior citizens have been the strongest constituency that I have ever had, and they are also my strongest critics when I am not doing things quite right. I respect the position of senior citizens, primarily because it is right; they are functioning members of this society, and we need to do as much as we can to make certain that their civil rights are protected.

You mentioned the senior citizens. You mentioned the disabled and handicapped. What else?

Senator SPECTER. Yes, aged and handicapped.

Mr. PENDLETON. As chairman of the San Diego Transit Corp., the local bus company in San Diego, we have been very instrumental in trying to make certain that all of our buses have wheelchair lifts. We have classes for people who are handicapped, who have seeing-eye dogs, to be able to use public transportation. In the

Model Cities program, I was an ardent supporter of the dial-a-ride system that is still in operation in San Diego, and certainly we need that to begin to move people to those locales that they could not do by regular transportation or could not do by auto because they could not afford it.

Senator SPECTER. Before leaving the issue of women's rights, have you taken a public position on ERA?

Mr. PENDLETON. I really have not taken a public position. I can only say to you about ERA that whether we have it or not, I am one who believes, like working for blacks' rights and minority rights, we have to work for women's rights. I am not sure that settles itself necessarily with ERA, but I do believe, in my own work and my own personal philosophy, to move forward with it. I do not think I am in control of that issue.

Senator SPECTER. If you were a State legislator and had the issue presented to you, how would you vote.

Mr. PENDLETON. I would assume that I would have to be a State legislator before I would vote.

Senator SPECTER. Yes, that was part of my hypothetical.

Mr. PENDLETON. I do not know.

Senator SPECTER. Let me rephrase it. Do you favor the ERA? Do you favor the equal rights amendment?

Mr. PENDLETON. Certainly.

Senator SPECTER. Have you had an opportunity to become familiar with the Voting Rights Act, with respect to the controversy whether there should be proof of intent to discriminate, or whether it would be sufficient to have the so-called results test?

Mr. PENDLETON. I have had some discussions about that. I have voiced my opinion in writing that I would like the act passed as it is right now, without any changes in it. I do have some problem that I have not really sorted out with the matter of the effects test. I have some problem about the blanket——

Senator SPECTER. The act, as it is currently interpreted by the Supreme Court in the *Mobile* case, would leave it with the intent test. Are you saying that you have thought through that issue and do favor the intent test, or are you saying that you really have not come to grips with the results test consequences?

Mr. PENDLETON. I have not come to grips with those consequences, but I am more inclined at this point, until further review, and not being a lawyer, to go along with the matter of the intent test.

Senator SPECTER. It is a vey complicated subject, and I would not press you on it. It is one that you will doubtless have some substantial contact with. I would appreciate it myself, if you take the opportunity to review that issue and to give us your view of it in writing at a later date. That is not something that a man or a woman is well advised to take a position on, on the spur of the moment. I would appreciate it if you could give the committee your view which way we ought to go, because that matter is before us now. There are continuing hearings before Senator Hatch's subcommittee, and we have a hearing on Monday morning, and it is very much on our minds.

Mr. PENDLETON. I think it is an issue that is going to come up again and again, if you will. I think the Commission already has

published a position on the Voting Rights Act, as I recall. I think that not being in that position at this time, it would be inappropriate for me to say anything about that in light of the fact that I am just an ordinary citizen at this point. So I would reserve judgment and would be glad to respond to you in writing when I can think that through.

Senator SPECTER. I am sorry. I did not get the last part of your answer.

Mr. PENDLETON. I would be glad to respond to you in writing when I think that through.

[Subsequent to the colloquy, the committee received the following reply:]

RESPONSE OF MR. PENDLETON TO SENATOR SPECTER

I believe that a ten-year extension of current law along the lines suggested by the President is the most desirable course. This is longer, as you know, than any previous extension.

An "effects" test for those jurisdictions, chiefly in the South, which have to preclear electoral changes with the Justice Department has proven its worth, and under the President's proposal will and should remain in place.

Extending an "effects" test to the rest of the nation is an entirely different matter. I am unaware of any compelling evidence which indicates the necessity of so major an expansion of the law's scope. If I believed such an expansion were necessary to protect the gains already achieved by the Act, I would not hesitate to recommend it. But I do not believe it is necessary, and I am unaware of anything in the hearing record before the House Judiciary Committee which suggests the wisdom of such a course.

Passage of a nationwide "effects" test such as that contained in the House bill may cause undesirable consequences in at least two areas.

First, it will induce a good deal of uncertainty and confusion in an otherwise known and settled body of law. It may take ten years or more for the courts to sort out all the changes.

Second, I am troubled by the implication in the House bill that the only or best way to enhance minority voting rights is to have minorities represented by members of their own race. I am aware that the House bill does not make proportional representation by race a legal requirement, but it does rather clearly suggest that deviation from proportional representation is somehow suspect. This will not only invite endless litigation, as I have suggested, but could lead to results that I consider unwise as a matter of policy. Although I would like to see more minority office-holders throughout the nation, I do not doubt for a moment that minority voters can make their views known and felt other than through the voice of a minority office-holder.

The key to effective representation for minority racial interests is the same as that for any other interest: we must register, organize, and get out the vote. So long as those crucial political processes remain open equally to all, regardless of race—and that is what the Voting Rights Act is designed to do—we need not and should not concern ourselves with anything that smacks of proportional representation by race.

Senator SPECTER. Fine. Thank you very much.

The Senate has been working on the issue of the jurisdiction of the Supreme Court and Federal courts on the issue of busing. While there are many of us who are opposed to busing as having been unsuccessful, there are some of us who feel—myself included, so you will know what my position is—that it is very unwise and drastic to limit the jurisdiction of the Court on that issue or on any issue because of where it may lead in limiting the Court's jurisdiction. Do you have an opinion on the desirability or wisdom of limiting the jurisdiction of the Supreme Court on busing?

Mr. PENDLETON. I have no opinion on it at this point.

Senator SPECTER. There is currently before the Congress a consideration of the administration's practices, as to how far the Office of Management and Budget can go on supervising regulations which may come out of various executive branch agencies and even on independent agencies. Would you maintain the same line of independence that you testified to earlier in the administration of the Commission, even in the face of OMB telling you what your regulations should say?

Mr. PENDLETON. Yes; I would. Independence is independence; you cannot have it both ways.

Senator SPECTER. Short and sweet.

One final question. There has been a substantial amount of public controversy over the prospective nomination of Reverend Hart to the Civil Rights Commission, and I have seen more of it than most because he is a Pennsylvanian and, in fact, a Philadelphian and, in fact, from my neighborhood. I have met with Reverend Hart this week, Senator Heinz and I did, for almost 2 hours, and I have requested the committee hold a hearing because it is a complex matter and I think there ought to be a public viewing of Reverend Hart and his views on the whole subject because of the importance of the Commission.

I have just been advised that such a hearing will be held, in due course, if Reverend Hart is nominated. I had not known, incidentally, that he had not formally been nominated until I was advised of that by the staff.

Senator GRASSLEY. That is correct. He has not been nominated.

Senator SPECTER. I bring up the Reverend Hart situation with respect to a very difficult issue which is pending in some of his expressed views, and that is the issue of homosexuality. I would be interested in what your views are, picking up on the language of sex from the statute, as to what your views are on the civil rights of homosexuals.

Mr. PENDLETON. Homosexuals are people, and if they have their civil rights violated, we need to protect them.

Senator SPECTER. I am impressed as much with the brevity as with the content of your reply.

Mr. PENDLETON. I would hope so.

Senator SPECTER. I think if that quality could be observed, not only by the Commission, not only by the courts, which are making West Publishing wealthy—they publish the opinions of the courts—but even by the U.S. Senate, it would be an admirable quality. To try to emulate that, I now conclude.

Mr. PENDLETON. Thank you, Senator.

Senator GRASSLEY. Thank you, Senator Specter.

Mr. Pendleton, I have no further questions, so I would like to simply thank you for being here today. May I express my hope, as well as that of Chairman Thurmond who could not be here today, that you will not spend all your time with the Commission staff, the people you oversee. I hope you will take adequate time to visit here with us frequently, not necessarily to testify but to discuss areas of mutual interest and to share your ideas on how we can work together to advance the civil rights agenda.

With those closing comments, unless either of my colleagues has anything to add, I would ask you to retire from the witness chair. I

congratulate you on your appointment and your service to the people of the United States, as you have been serving the people of San Diego.

Mr. PENDLETON. Thank you very much, to you and the committee, Senator.

Senator GRASSLEY. I would now like to call to the witness stand, individually, our next witnesses. These witnesses are in regard to the nomination of Clarence Pendleton, Jr. I would first of all like to call William Taylor, chairman of the Compliance and Enforcement Committee, Leadership Conference on Civil Rights.

I would like to urge you, if you would please, to summarize any statement you have and to make the summary as short as possible, and any written statement you have will be received in its entirety and printed in the record.

STATEMENT OF WILLIAM L. TAYLOR, CHAIRMAN, COMPLIANCE AND ENFORCEMENT COMMITTEE FOR THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. TAYLOR. Thank you, Mr. Chairman. I will be brief.

My name is William Taylor. I am director of the Center for National Policy Review at Catholic University Law School, in the civil rights group, and an adjunct professor at the law school. I also serve, as you noted, as chairman of the Committee on Compliance and Enforcement of the Leadership Conference on Civil Rights, which is a group of 163 civil rights organizations, civic organizations, and labor organizations which over the years have worked for strong legislation and strong enforcement.

It may also be pertinent to note that I served as an employee of the U.S. Commission on Civil Rights for 7 years, 2 years as general counsel and 3 years as staff director, appointed by President Johnson.

The Leadership Conference, at its board meeting last Sunday night, adopted a resolution, copies of which we furnished to the committee. I will not read it in full, in the interests of time, but it urges that judgment be reserved on the present nomination; and in view of the public statements made by Mr. Pendleton, the Senate committee considering the nomination should be urged to hold thorough hearings and diligently inquire into his record and background to make sure that he possesses the qualifications to carry out effectively the purposes of the agency.

We think that the public statements that Mr. Pendleton has made raise questions that do require the most searching kind of investigation, more searching than is possible in a single day of hearings that, as Senator DeConcini noted, were very hastily scheduled.

I have listened with care and attention, I hope, to the statements that Mr. Pendleton has made here this morning in clarification of some of his prior statements. Speaking only for myself, I would say that they are partially reassuring as to the concerns but not completely reassuring. I would like to take just a few minutes to go through why these are such serious questions and urge that this committee weigh his answers today against his previous answers and evaluate all of the relevant information before making a decision.

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The first important question is whether the nominee has the capacity to serve the Commission with the requisite degree of independence called for by its statute and its history, or whether he would respond to the dictates of the administration. The statement that raises the most concern in the New York Times of November 21, 1981, has been quoted here this morning. It is important that it be looked at in full context.

Mr. Pendleton, when first asked the question, said, "I support whatever is on the books now." The interviewer then advised him that Pendleton James had told the press that the nominee shared the President's opposition to affirmative action programs, and it was in response to that that Mr. Pendleton is quoted as saying, "Whatever the Administration's policy is in this respect, I have no choice but to support that policy which must have come up through some previous advice."

That statement, as has been noted here this morning, is in direct conflict with the duties of the Commission as set out in the Civil Rights Act of 1957. The law requires the Commission to appraise the laws and policies of the Federal Government with respect to discrimination or denials of equal protection of laws or in the administration of justice. The Commission, under law, is required to report these matters to Congress, as well as to the President.

To put it directly, the duty of appraising the policies of the Federal Government on civil rights cannot be performed by someone who believes he must take orders from the President or anyone else. That has been recognized from the very beginning of the Commission.

When President Eisenhower made his first appointments to the commission, he said, and I am quoting: "I want to get the spectrum of American opinion on the matter, not just people who agree with [him]."

When Eisenhower's appointees were before this committee for confirmation, the question arose whether a higher authority could direct the Commission to take some action, and as Senator Specter noted, Senator McClellan said, "I do not think anybody has the authority to give you instructions. I thought this was an independent commission." Senator Eastland said, "That was the congressional intent."

Through the years, this basic principle has been reaffirmed, both in the independent character of the people appointed to the Commission and in the way in which the Commission has conducted its affairs. In the 1960's, President Kennedy opposed the Commission's plans to hold hearings to investigate conditions in Mississippi. The Commissioners postponed the hearings for a time, in deference to the President's wishes, but they ultimately held them over the vehement objections of the administration, as expressed through the Attorney General. I think it was very important, in retrospect, that those hearings were held.

If things were otherwise, serious problems could arise. To cite just one example, the Commission has broad powers of investigation and subpena. A commission that was subject to the dictates or to the direction of the President could be ordered to use its authority to aid a Justice Department investigation, and that would create

major issues of due process and fairness to the people being investigated.

That is why I think that statement that the nominee made must be taken with the utmost seriousness, and the committee must be fully satisfied, not just that he would respond to what is on the books but that he would not allow the independent judgment of the Commission to be affected by the wishes of the administration.

Second, Mr. Pendleton has made statements that raise questions about whether he possesses the temperament to serve as Chairman of the Commission. I refer here specifically to the interview he gave to People magazine. With due respect, I think it is important that that quote be verbatim on the record.

He was asked, "How are you received at civil rights conferences." His answer in People was:

> Coldly. I met Jesse Jackson at one, and he treated me like shit.
>
> When I was attending a conference right after my nomination, Vernon Jordan came up to me and said, "They're holding prayer meetings about you tonight," so I said, "After they do that, they ought to hold prayer meetings for themselves. The black leaders are just killing themselves by abandoning me. I was one of their only links to the Administration, and they've blown it."

That is the end of the quote.

When President Eisenhower made his initial appointments to the Commission, he said he was seeking people of thoughtful mien, who could command full public confidence. That has been the tradition.

The Commission chairmen have included John Hanna, who was president of Michigan State University, in addition to other posts that he has held; Father Hesburgh; Arthur Fleming, who has held more responsible positions than one could take the time to mention. Its members have included several distinguished deans of law schools, among them Robert Storey of SMU, former president of the American Bar Association; George Johnson, dean of Howard Law School; Spottswood Robinson, dean of Howard law school and now a member of the Court of Appeals for the District of Columbia Circuit; Owen Griswold, who was dean of Harvard and then Solicitor General after he was a member of the Commission.

The qualities of thoughtfulness that President Eisenhower talked about, and even temperament that these and other members of the Commission possess are crucial to the work of the Commission. The Commission's job is to bring facts to bear in an area where emotions run high. The Commission also serves as a bridge between citizens and groups that have grievances as to the Federal Government. People have known over the years that even when the rest of the Government turned a deaf ear to complaints of discrimination, the Commission would listen; it would sift the facts, and it would bring important matters to the attention of the President and the Congress.

Yet Mr. Pendleton says that he does not like the way some civil rights leaders treated him, and because of that they've blown it in terms of his serving as a bridge between the civil rights community and the administration. That is a matter of concern.

We are in a period now when emotions on race relations and other discrimination issues are running very high. The last thing

we need is somebody in charge of the Civil Rights Commission who will fan the flames rather than exercising a calming influence.

As I say, I was somewhat reassured by some of the statements made by the nominee this morning, but I do think the Senate has an obligation to scrutinize these views very carefully.

Finally, Mr. Chairman, Mr. Pendleton has expressed some strong views on civil rights issues, including remedies for school segregation and employment discrimination. Certainly he is entitled to those views. But it is not clear that he is aware that some of the opinions do conflict with existing law or that he is aware of the facts that gave rise to these remedies.

I was particularly disturbed this morning by his statement that he had no opinion on court-stripping legislation, an issue that raises the most fundamental constitutional considerations. So I think the committee should ascertain, in the process it has begun today, whether Mr. Pendleton has an open mind on these matters and whether his views are subject to alteration after he has fully reviewed the laws and facts.

The voting issues, as you know, are crucial issues. I think this committee, even in advance of confirmation, is entitled to a careful consideration and the weight of the views expressed by the nominee.

In summary, these are difficult matters to deal with, and I appreciated listening to the committee this morning and the careful way it is going about it. I have never been up on Capitol Hill before in testimony to raise questions about a nomination, and I do so with some hesitation here today.

I think ultimately it would ill serve the Senate's constitutional responsibilities to advise and consent, it would ill serve the national policy of equal opportunity, it would ill serve something we all want, and that is an improvement in relations between groups in this country, if you did not give the most careful consideration to the questions raised about this nomination before taking action.

That is my statement, Mr. Chairman. I would be glad to answer questions.

Senator GRASSLEY. Thank you. I do not have any questions, although you may expect some in writing. We would appreciate your quick response to them. Thank you very much for your testimony.

[The resolution of Leadership Conference on Civil Rights, submitted by Mr. Taylor, follows:]

RESOLUTION

LEADERSHIP CONFERENCE ON CIVIL RIGHTS

From the Board Minutes:

The National Board of the Leadership Conference on Civil Rights, at its meeting on Sunday, February 21, adopted, unanimously, a motion to oppose the nomination of B. Sam Hart to the U.S. Civil Rights Commission and to reserve judgement on the nomination of Clarence Pendleton to be Chair of the U.S. Civil Rights Commission and Clarence Thomas to be Chair of the Equal Employment Opportunity Commission. The board further agreed that in view of the public statements made by Mr. Pendleton and the responsibilities held by Mr. Thomas as Assistant Secretary of Education, the Senate Committees considering their nominations should be urged to hold thorough hearings and diligently inquire into their records and backgrounds to make certain that they have the qualifications to carry out effectively the purposes of their agencies.

It was agreed that the motion gives the LCCR the opportunity to issue additional statements on these nominations at a later date.

Senator GRASSLEY. I will call the next witness, Arnoldo Torres, national executive director, League of United Latin American Citizens.

The committee has not received your written statement, and we would receive that in toto and then ask you to summarize.

STATEMENT OF ARNOLDO TORRES, NATIONAL EXECUTIVE DIRECTOR, LEAGUE OF UNITED LATIN AMERICAN CITIZENS

Mr. TORRES. I would like to apologize for not submitting it in time. It has been a hectic week for all of us, and the whole issue of whether to hold hearings or not was always up in question. We have the committee staff to thank for allowing us the opportunity to come before you, and we thank you and the committee staff and Senator DeConcini.

For the record, my name is Arnoldo Torres. I am the National Executive Director of the League of United Latin American Citizens, which is this country's oldest and largest Hispanic organization.

The Hispanic overview of the U.S. Commission on Civil Rights is somewhat mixed. Only recently, in the last 7 years, have we begun to see a very strong emphasis put into viewing the concerns of the Hispanic community. Nonetheless, the Commission has, throughout its history, provided, as it has always been considered, kind of a conscience of the country on civil rights. Their work has been extremely important and key to many of the civil rights gains made legislatively throughout the years.

The reason we come before you today is to raise some concerns about Mr. Pendleton. We are aware of his illustrious background. However, we are very concerned about even the responses that he provided today. The issue of independence has been raised by Mr. Taylor, by Senator Specter, and by Senator DeConcini.

We are still nonetheless concerned because we have, as Bill has very clearly pointed out, a clarification or a reclarification from the White House in the New York Times article of what Mr. Pendleton is supposed to say. We are also concerned because of statements made by the political affairs director in the White House, indicating of a nomination to a civil rights agency of the Federal Government, "He will do what we want. He is loyal to the administration." Again, that brings out the whole sphere of whether Mr. Pendleton will in essence be an independent individual in his actions as the Chair of the U.S. Commission on Civil Rights.

The other point that really seriously disturbs us about Mr. Pendleton's comments today is the fact that he appears to be very, very interested in innovative approaches to enforcing civil rights. He is perhaps one of the most novel nominees made in the history of the Commission, because he comes in with some reservations about previous remedy approaches to dealing with civil rights discrimination and civil rights problems.

We refer to the report by the Civil Rights Commission, "Civil Rights, A National Not a Special Interest," June 25, 1981. That report clearly indicates that through the budget process the civil

rights enforcement mechanism of the Federal Government is being, in essence, dismantled.

Now, that is the present situation. That is not talking about the need for new ideas. I am very concerned, would Mr. Pendleton, in his position as the Chair, give ultimate priority to developing new innovations, when the existing mechanisms have not been enforced adequately or properly and are being enforced even less in the last year under this administration. Or is he going to make it his priority to do what the Civil Rights Commission did in issuing that report, which was to let the country and the administration know that civil rights is not a special interest that is competing for Federal moneys; it is a process, it is the foundation on which this American society is built, which is constitutional protection.

There appears to be this obsession, perhaps, in some of the statements that Mr. Pendleton has made today that he wants to look into zoning, he wants to look into regulatory reform. That very much seriously bothers us, because we do not even have good enforcement of affirmative action, we do not have good enforcement of title VII, we do not have very good enforcement anywhere, and that is the existing problem, not having to get into new innovative ideas.

The other thing that concerns us about Mr. Pendleton is his view of supply side trickle-down economics. It is fine to have that view. I am sure that Mr. Pendleton has numerous examples that he can point to in his experience in San Diego where it has worked significantly. But what he does not reconcile, perhaps, is how does his view of trickle-down economics compare with the traditional social programs in working to reach the disadvantaged status of minorities. How does the trickle-down approach to economics really do away with the discrimination that exists in this country.

I would be very interested in knowing Mr. Pendleton's comments in this specific regard, because no matter how much you may have in a nice job of CETA employment or CETA training, the essence is that you still do not have an effective and aggressive enough mechanism to insure that these people are going to be hired. So the supply side trickle-down economics, as he has stated it, is not very clear as to how it is going to address that issue.

I would also enter for the record his written comments or stated comments to questions in the interview of January 11, in People magazine. He indicated, in response to how he viewed the supply side trickle-down economics, "It damned sure doesn't trickle up. I don't want to eliminate poverty. I want to create wealth." We would just leave that for the record.

In essence, Mr. Chairman, we do have very serious concerns with Mr. Pendleton's nomination.

We are even more concerned that unfortunately more members of this full Judiciary Committee could not attend today. The questions that we raise are serious ones that really do merit some specific attention from this committee and should not be dispensed with simply as a procedural process of having people come in and raise issues because we do not necessarily agree with the philosophy of the nominee.

The issue here is much greater than that. The issue of independence has been very well raised. But more importantly, it is what

Mr. Pendleton intends to do when he is the Chair of that Commission on Civil Rights. We do not need necessarily a priority for new ideas. The old ideas, the existing ones, have not worked because they have not had a strong commitment to them. Is Mr. Pendleton going to act in the same way? I would think, based on what his comments were today, that perhaps he will, and again we will have some severe problems in this country that can only and will only increase and not be abated.

I would lastly say that I do not think that the appointment of minority people to civil rights entities in the Federal Government should be viewed as simply solving the problem and that everything is going to turn out right if it happens. It is the quality and perspective of the individual that is the most important thing when it comes to this issue, and unfortunately Mr. Pendleton, I think, is not in the right frame of mind to serve in the best interests that we are concerned with.

I appreciate the opportunity to come before you again. I do not believe you would have any questions, since you were not able to receive our testimony. But if you do, I would be more than happy to respond to them, either in writing or orally at this time.

Senator GRASSLEY. Thank you, Mr. Torres. I do not have any questions.

I will call the next witness, Althea T. L. Simmons, director of the Washington Bureau, the National Association for the Advancement of Colored People.

STATEMENT OF ALTHEA T. L. SIMMONS, DIRECTOR, WASHINGTON BUREAU, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Ms. SIMMONS. Thank you, Mr. Chairman, for allowing me the opportunity to come and be heard on the nomination of Mr. Pendleton.

I would like to associate myself with the remarks of the two preceding persons, because we do share some of the same concerns.

The NAACP, a 73-year-old civil rights organization, is concerned about the independence of the Commission. We are proud that we had a hand in helping to get that legislation passed, and we are also proud of the fact that the Commission has been true to its statutory mission over the years. We believe it must remain a strong, independent, viable entity.

We also believe that the chairman and the members of the Commission have a responsibility to the Nation that permits no equivocation on the issue of discrimination.

Our concern is based on accounts that have appeared in the press, our discussion with members of the San Diego community, our discussions with the heads of organizations in San Diego as to Mr. Pendleton's reputation in the community, and with regard to his perception, as expressed in the press, of the Commission, and what he would do as chair of that body.

The NAACP is concerned about how he perceives the role of the Commission. It occurs to us that Mr. Pendleton's purported statement that he is "a supply sider on social programs," may be giving us a message that he perceives the role of the Commission in a way

that is a nontraditional role, in trying to monitor and help protect civil rights.

We are also concerned about a quotation attributed to him, and I would like to say it for the record, when he was asked about his expected post as Chair of the Commission. He said, and I quote, "What is past is prologue, and we have to make way for the future. The civil rights movement has changed. Things now have to be negotiated out."

We are am not quite certain what Mr. Pendleton means by that. We are consciously aware of his reputation in his local community, with reference to the Model Cities agency and the fact that this agency was dismantled; we are worried as to whether or not, in view of the fact that the Commission's authority expires in 1983, there will be some attempt to try to dismantle the Civil Rights Commission.

We are also concerned about another statement, and I quote: "What makes the Civil Rights Commission so sacroscanct that the President can't change it? I can understand the concerns, but it just won't wash."

It is my understanding that the Commission has a responsibility to the Congress, to the administration and the Nation. The Commission does have a unique role to play in the Government. The Commission is a little bit different from the cabinet agencies.

We are also concerned about Mr. Pendleton's expressed opposition to affirmative action programs. In one place in the press it is said that he opposed quotas. In another place it said that he has problems with goals and timetables. We are also concerned about the fact that he had said that he is for renewal of the Voting Rights Act: "Don't change a word." In view of the fact that the testimony in the House proves without doubt that there is a need for some changes in the Voting Rights Act, we are concerned that a person may head the agency who is not addressing those particular concerns.

Lastly, the U.S. Commission on Civil Rights recently issued a statement on Affirmative Action in the 1980's Dismantling the Process of Discrimination. It said the statement was to provide a conceptual direction and guidance to ongoing and future affirmative efforts and to answer those hard questions that were raised by critics. The Commissioners concluded, and I quote, "Only if discrimination was securely placed in a well distant past would affirmative action be an unneeded and drastic remedy."

We would hope that the members of this committee would raise the question as to whether Mr. Pendleton's views would place him on a collision course with this well-documented statement recently issued by the Commission. We would also hope that prior to confirmation of Mr. Pendleton, the members of this committee would probe deeply with regard to his views on court stripping legislation, subminimal wages for youth, the Voting Rights Act, and court-ordered remedies for school desegregation.

We believe that those are important and critical issues for those of us who make up the civil rights community, and we hope that the person who chairs this Commission will remember the mission of the Commission and will move forward in trying to make equality a reality in our lifetime.

I appreciate the opportunity to come and share these concerns and to indicate our opposition to Mr. Pendleton based on the statements that he has made to the press. I am not reassured, based on his statements made to this committee this morning. I would be pleased to answer any questions you might have.

Senator GRASSLEY. Ms. Simmons, I have no questions. Thank you very much for your testimony.

Ms. SIMMONS. Thank you for allowing me to come.

[The prepared statement of Ms. Simmons follows:]

Prepared Statement of Althea T. L. Simmons

Mr. Chairman, and members of the Committee, I am Althea T. L. Simmons, Director of the Washington Bureau of the National Association for the Advancement of Colored People. I thank the Committee for affording me this opportunity to testify on the nomination of Mr. Clarence Pendleton to be chair of the United State: Commission on Civil Rights.

The NAACP is a 73 year old civil rights association with a membership base operating in more than 1800 communities in all 50 states and the District of Columbia. We are proud of the fact that we had a hand in helping pass the law which established the Civil Rights Commission some 25 years ago. We are also proud of the fact that the Commission has been true to its stated mission of appraising the laws and policies of the Federal Government with respect to discrimination or denials of equal protection of the laws in the administration of justice and that it has served as the conscience of the governm t. We believe that the Commission must remain a strong, independent and viable entity.

There is still a pressing need for the Commission to continue to document the need for civil rights legislation and to assist in the effort to enact same. We also believe that it is just as important for such a Commission not to reflect the views of a particular administration and to take issue with an Administration when it is derelict in its responsibility. The Commission must be forthright in its investigations of complaints, collection of information, appraisal of Federal laws and policies with respect to discrimination and report its findings to the Executive and the Congress.

The Chair and members of this Commission have a responsibility to the nation that permits no equivocation on the issue of discrimination. The head of the U. S. Commission on Civil Rights must bring to the position impeccable credentials in the area of civil rights, a clarity of vision and a zeal for fulfilling the mission of the Commission

The NAACP has been sorely troubled by the media reports of Mr. Pendleton's views on critical civil rights issue e. g. affirmative action, court-ordered school desegregation remedies. We have yet to see a refutation of the media reports regarding his alleged views so we must assume that

they are an accurate reflection of his position on these vital issues. We have no doubt but that the nominee is a person of good will; our concern centers on his perception of the Commission's statutory mission and how he plans to fulfill such mission.

Mr. Pendleton's public statements and his background indicate a preference for private economic development over traditional civil rights programs as a solution to the disadvantaged status of minorities. We are concerned as to whether it is his intention as chairman to carry out that portion of the Commission's mandate which calls for it to appraise the laws and policies of the Federal government and to ascertain how effectively the government is enforcing civil rights statutes.

We are not unmindful of the reputation Mr. Pendleton enjoys in his local community of San Diego. Black and white leaders in the San Diego community recount his "dismantling activities" with regard to the Model Cities program and his stated views that he is a "supply-side[r]...on social programs".

The nominee has been quoted as saying (about his expected new post as chair of the Commission) "What is past is prologue, and we have to make way for the future. The civil rights movement has changed and you aren't going to be able to march and protest and burn. Things have to be negotiated out". The NAACP's concerns also embrace the fact that the Commission is due to expire in September of 1983 and we trust that the members of this committee will ascertain the nominee's views concerning whether or not the Commission should be extended by the Congress.

Mr. Chairman and members of the Committee, the NAACP believes that the Voting Rights Act, affirmative action, court-ordered remedies for school desegregation and employment are key civil rights issues; we do believe that the Civil Rights Commission has a unique role to play in the government; the NAACP is not as sanguine as the nominee appears to be in his alleged statement:

> "What makes the Civil Rights Commission so sacrosanct that the President can't change [it]. I can understand, but it doesn't wash".

The NAACP believes that the Commission is different from other federal agencies; that it must continue to identify those problems that are systemic to the

Federal government and to make recommendations regarding ways in which the civil rights effort of federal agencies may be strengthened. The NAACP also believes that the Chairman of the Commission can, in large part, determine how the Commission is to operate.

Mr. Pendleton has expressed opposition to affirmative action programs designed to increase minority and female employment opportunities; he has expressed his opposition to court-ordered busing; he has said about the renewal of the Voting Rights Act, I'm for it - don't change a word"; he has specifically stated that he does not believe in the use of such mechanisms as "goals and timetables" and "whatever the Administration's policy is in this respect, I have no choice but to support that policy, which must have come up through some previous advice."

The Commission that Mr. Pendleton seeks to head, in November, 1981 issued a statement on Affirmative Action in the 1980's: Dismantling the Process of Discrimination designed "to provide conceptual direction and guidance to ongoing and future affirmative action efforts and to answer the hard questions raised by critics." The Commission has concluded that "only if discrimination were securely placed in a well-distanced past would affirmative action be an unneeded and drastic remedy". We would hope that the members of this Committee would raise the question as to whether Mr. Pendleton's views would place him on a collision course with this well documented statement already issued by the Commission.

Voluntary busing has not been an effective means of desegregating the nation's schools yet the nominee supports voluntarism over a court-ordered remedy.

The Voting Rights Act hearings in the House pinpointed the need for a strengthening of the Act, yet the nominee has said, "don't change a word" when speaking of the Act.

Minority youth unemployment is skyrocketing and assistance to the large horde of "havenots" is being reduced, yet the nominee supports a sub-minimum wage for youth.

Mr. Chairman, it is the NAACP's considered opinion that Mr. Pendleton's views on critical civil rights issues, as reported in the press, are diametrically opposed to the views held by the civil rights community and are not in keeping with the Commission's own findings. Therefore, Mr. Chairman, the NAACP must oppose the nomination of Mr. Pendleton as chair of the U. S. Commission on Civil Rights.

Senator GRASSLEY. I would like to read into the record at this point, in regard to the nomination and our consideration of the nomination of Mr. Pendleton, some communiques that have been received as early as this morning.

From Ben F. Andrews, Jr., Connecticut, president NAACP, a member of the national board, a mailgram:

Dear Senator, I am writing to encourage your committee to give favorable approval for the appointment of Mr. Clarence Pendleton as chairman of the U.S. Commission on Civil Rights.

Mr. Pendleton has demonstrated a keen awareness of the positive effect in implementation of civil rights legislation. In carrying out duties for the Urban League, he maintains a broad involvement in organizations such as the one that I represent, the NAACP, and does not restrict himself to a narrow and limited point of view.

I serve as a State president of the NAACP and a member of the national board of directors of the NAACP, and I have found that there is no one way to view the impact of civil rights legislation as it is reported through our society.

I am certain that Mr. Pendleton would represent this country well in that position and deserves the support of you and your committee.

From John L. Welks, Public Relations Council, Washington, D.C.:

As former deputy asssistant secretary of labor and director of Federal contracts compliance, I take seriously the importance of selecting responsible and knowledgeable citizens to sit on commissions or otherwise be instrumental to carry out Government policy in the area of civil rights. I want to support the President in his nomination of Clarence Pendleton to be chairman of the Civil Rights Commission.

Mr. Pendleton has a long and distinguished professional career in civil rights and civic work. My personal knowledge of his keen insight and creative thinking ability leads me to believe that he will prove to be a very able and broadly appreciated chairman of this important Commission.

To Senator Strom Thurmond [Senator Grassley continues reading]:

We, the Colorado State Association of Colored Women's Clubs are in support of the nomination for Chairman of the Civil Rights Commission of Mr. Clarence M. Pendleton, Jr. Mrs. Johnnie B. Peters, president of the Colorado State Association of Colored Women's Clubs.

Another letter from Paul E. Leyton to Strom Thurmond:

Mr. Chairman, President Reagan has nominated Mr. Clarence Pendleton of San Diego, California, to be the chairman of the U.S. Commission on Civil Rights. As a businessman I wholeheartedly support this. In community activities and in his function as president of the Urban League, Clarence has brought a balanced view of his goals and the ability of the community to assist him in accomplishing them to every endeavor in which he has been involved. In these times, his approach to problem solving is not only most appropriate but is that which is most successful. I commend to you and your committee Mr. Clarence Pendleton to be our next chairman of the U.S. Civil Rights Commission.

We have approximately 15 other such communications that we will submit for the record.[1]

For the record, I would like to remind the committee that the Civil Rights Commission, or more accurately the Commission on Civil Rights, was created by the Civil Rights Act of 1957. The Commission makes findings of fact but has no enforcement authority. Findings and recommendations are submitted to both the President and the Congress, and many of the Commission's recommendations have been enacted, either by statute, executive order, or regulation. The Commission evaluates Federal laws and the effectiveness of

[1] The communications referred to are on file with the committee.

Government equal opportunity programs. It also serves as a national clearinghouse for civil rights information.

We have received testimony and asked questions about the chairmanship of this very important Commission, as we fill these vacancies. The information we receive will be very important to us in analyzing the appropriateness of the nominees to this Commission. We feel that this is a very important Commission, a very important instrument within our Government to see that every citizen of this country is given and able to exercise those civil rights that they constitutionally have.

This is the end of the hearing, and the hearing is adjourned.

[Whereupon, at 1:25 p.m., the committee recessed, to reconvene at the call of the Chair.]

BIOGRAPHIES

LEROY J. CONTIE, JR.

NOMINEE, U.S. CIRCUIT JUDGE, SIXTH CIRCUIT COURT OF APPEALS

Birth: April 2, 1920, Canton, Ohio.
Legal residence: Ohio.
Marital status: Married to Janice Sherer Contie.
Education: 1937-41—University of Michigan, B.A. degree; 1941-42, 1945-48—University of Michigan Law School, J.D. degree.
Bar: 1948—Ohio.
Military service: 1942-45—U.S. Army.
Experience: 1948-51, 1952-59 (part-time), 1960-68—Contie & Contie, Canton, Ohio, partner; 1952-59—City solicitor, city of Canton; 1969-71—Judge, common pleas court, Stark County; 1971 to present—U.S. district judge, Northern District of Ohio.

ROBERT B. KRUPANSKY

NOMINEE, U.S. CIRCUIT JUDGE, SIXTH CIRCUIT COURT OF APPEALS

Birth: August 15, 1921, Cleveland, Ohio.
Legal residence: Ohio.
Marital status: Married to Marjorie Blaser.
Education: 1939-42—Adelbert College, Western Reserve University, B.A. degree (1946); 1946-48—Thomas Backus School of Law, Western Reserve University, J.D. degree.
Bar: 1948—Ohio.
Military service: 1942-45—U.S. Army Air Corps, honorable discharge.
Experience: 1948-51—Private practice, Cleveland; 1951-57—Assistant attorney general, State of Ohio; 1957-58—Director, Department of Liquor Control, State of Ohio; 1958-59—Common pleas judge, Cuyahoga County; 1960-69—Metzenbaum, Gaines, Krupansky, Finley & Stern, partner; 1969-70—U.S. attorney, Northern District of Ohio; October 1970 to present—U.S. district judge, Northern District of Ohio.

JOHN R. GIBSON

NOMINEE, U.S. CIRCUIT JUDGE, EIGHTH CIRCUIT COURT OF APPEALS

Birth: December 20, 1925, Springfield, Mo.
Legal residence: Missouri.
Marital status: Married to Mary Elizabeth Vaughn, 2 children.
Education: 1946-49—University of Missouri at Columbia, A.B. degree; 1949-52—University of Missouri at Columbia Law School, LL.B. degree.
Bar: 1952—Missouri.
Military service: 1944-46—U.S. Army, staff sergeant.
Experience: 1952-81—Morrison, Hecker, Curtis Kuder & Parrish (Associate, 1952-57, partner, 1957-81); 1973-77—Board of police commissioners, vice president; 1981 to present—U.S. district judge, Western District of Missouri.

CONFIRMATION HEARING ON:

JOHN L. COFFEY, WILLIAM W. CALDWELL, GLENN E. MENCER, AND CAROL LOS MANSMANN

THURSDAY, MARCH 11, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 10:35 a.m., in room 357, Russell Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Also present: Senator Specter.

Staff present: Duke Short, chief investigator; Allan Spence and Bill Christensen, investigators; and Pamela Swanner, clerk.

NOMINATION OF JOHN L. COFFEY

The CHAIRMAN. The committee will come to order. We had hearings set at 10:30; it is 10:25, but with these judges here, we can just save time, I think, by going ahead.

First is U.S. circuit judge, Justice John L. Coffey, of Wisconsin, to be U.S. circuit judge for the Seventh Circuit Court of Appeals. Is he here?

Justice COFFEY. Yes, sir.

The CHAIRMAN. Do you want to come around, Judge?

Do you want to hold up your hand and be sworn?

Justice COFFEY. Yes, sir.

The CHAIRMAN. Do you swear that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Justice COFFEY. I do.

The CHAIRMAN. Have a seat. Do you have any members of your family here you would like to introduce to us?

TESTIMONY OF JUSTICE JOHN L. COFFEY, NOMINEE, U.S. CIRCUIT JUDGE, SEVENTH CIRCUIT COURT OF APPEALS

Justice COFFEY. Yes, Senator, I do, please: my wife, Marion Coffey; my daughter, Elizabeth Robinson; my son, Peter Coffey; my son-in-law, Steven Robinson.

The CHAIRMAN. We are very pleased to have all of you here.

I believe you are now a justice of the Wisconsin Supreme Court?

Justice COFFEY. Yes, sir, I am.

The CHAIRMAN. The record shows that you were born in Milwaukee, Wis., and that you are married and have two children.

Justice COFFEY. Yes, Senator.

The CHAIRMAN. And a son-in-law, I believe you said.

Justice COFFEY. Yes, sir, and a granddaughter who is not with us.

The CHAIRMAN. You attended Marquette University, with a B.A. degree, and also a J.D. degree in the college of law there.

Justice COFFEY. Yes, sir.

The CHAIRMAN. You were in the Navy for 3 years, from 1943 to 1946 in World War II?

Justice COFFEY. Yes, sir.

The CHAIRMAN. Where did you serve in the Navy?

Justice COFFEY. Great Lakes, Ill.; I did not leave Great Lakes.

The CHAIRMAN. You served as assistant city attorney for the city of Milwaukee, county civil court judge in Milwaukee County, municipal court judge in Milwaukee County, and circuit court judge in Milwaukee County, and you have been on the Supreme Court of Wisconsin since 1978.

Justice COFFEY. Yes, sir.

The CHAIRMAN. Now, do you have any statements you would like to make to the committee?

Justice COFFEY. Yes, Senator. I am very pleased that President Reagan and Senator Kasten have seen fit to bring me before this committee. I am very honored to have the opportunity to appear before you, and look forward to the opportunity to serve on the Federal bench, if I am approved.

The CHAIRMAN. Justice Coffey, you have served on the Wisconsin Supreme Court, as I stated, since 1978. How do you feel personally about your own capacity at this point in your career to carry out the very significant power and responsibility of being a circuit court judge in the Federal system?

Justice COFFEY. I feel, Senator, that having served on the trial bench for 24½ years and on the Wisconsin Supreme Court for 3 years and almost a half, I have served my judicial internship, and I do look forward to handling those cases on the Federal court.

I feel that with my experience, I can make a significant contribution.

The CHAIRMAN. Have you served as a trial court judge?

Justice COFFEY. Yes, sir, 24½ years; criminal court, as well, for 17 years.

The CHAIRMAN. So, your experience now as a Federal circuit judge would be somewhat similar to the Supreme Court of Wisconsin; it would be an appellate court.

Justice COFFEY. Yes, sir.

The CHAIRMAN. I was pleased in reviewing your record to note that while presiding in the municipal and circuit criminal divisions, you disposed of somewhere around 450 cases annually, approximately 30 percent of which were jury trials.

Justice COFFEY. Yes, sir.

The CHAIRMAN. Do you have any recommendations that would assist in speeding up the disposition of cases for the Federal district courts? It seems we have a backlog in most places.

Justice COFFEY. Well, Senator, inasmuch as I have not been in the Federal system, I can only say that in the system that I have

been in, I believe that the system could be speeded up by sort of limiting the discovery period and accelerating the trial, at the same time guaranteeing to each defendant a full and fair trial.

The CHAIRMAN. Do you think if the judges worked a little longer each day, it would help to wind up these cases?

Justice COFFEY. I am very confident that that would not do any harm.

The CHAIRMAN. The district judges, if they are determined to clean these dockets up, could go a long way to doing it, could they not?

Justice COFFEY. That is very true.

The CHAIRMAN. Justice Coffey, what are your views on the primary purposes of the criminal justice system?

Justice COFFEY. To bring the case to trial at the earliest possible date and to see that justice is rendered to all concerned.

The CHAIRMAN. Justice Coffey, what is the proper application of stare decisis in constitutional law? Specifically, what is the duty of a Federal judge when confronted with a case in which one of the precedents of his court clearly conflicts with the Constitution, as that judge interprets it?

Justice COFFEY. I feel that what ought to be done is that the particular case should be reviewed thoroughly; the Constitution should be applied. If there is some problem after a thorough analysis, they should look into this problem.

I might point out that I am not a judicial activist, nor have I ever been.

The CHAIRMAN. Do you believe the Constitution says what it means and means what it says, and judges ought to abide by it?

Justice COFFEY. Very definitely, sir, beyond doubt.

The CHAIRMAN. And if there appears to be a vacuum, is that not a matter for the Congress and not the judges to act on?

Justice COFFEY. Yes, sir.

The CHAIRMAN. We are glad to have Senator Kasten with us. Senator, we started a few minutes ahead in order to get through; we have some other appointments. But we are delighted to have you with us.

Judge Coffey, I want to say you are very fortunate to have such an able and fine Senator here in Senator Kasten, who I understand has recommended you and is now here to make some remarks about you. We will be pleased to hear them at this time.

STATEMENT OF HON. BOB KASTEN, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KASTEN. Mr. Chairman, thank you, and I would like to thank you and your staff for the help that you have been to all of us. I also appreciate the difficult circumstances under which you are operating this morning, and we very much appreciate your help.

I am pleased, Mr. Chairman, to have this opportunity to introduce John L. Coffey, whom I have recommended and whom the President has nominated to fill the current vacancy on the Seventh Circuit Court of Appeals in Chicago. I might mention that that vacancy was created when Justice Thomas Fairchild stepped aside.

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He was also a Wisconsinite, and we are pleased that the President has recommended that another Wisconsin citizen fill this position.

Justice Coffey is a native of Milwaukee, and completed both an undergraduate degree and a law degree at Marquette University. He served with the Navy in World War II and then began a long and a distinguished legal career.

Justice Coffey served as assistant city attorney in Milwaukee from 1948 to 1954; was elected a civil court judge in Milwaukee County in 1954, and became a municipal court judge in 1960. In 1962, he became a circuit judge, where he served until 1978 when he successfully ran for his current position on the Wisconsin Supreme Court.

Having served on the bench since 1954, Justice Coffey comes to the Federal court of appeals well equipped to make an excellent contribution to our judiciary. While serving on lower courts in Wisconsin, he has been affirmed 279 times by the Wisconsin Supreme Court, while being reversed only seven times. Since being on the Wisconsin Supreme Court, he has participated in more than 750 majority opinions.

So, Mr. Chairman, I am delighted to be able to introduce Justice Coffey to you, and I enthusiastically recommend him to the President and know that he will represent all of us well in Chicago on the Seventh Circuit Court of Appeals.

I understand, also, Mr. Chairman, that he is joined by his wife and several members of his family.

The CHAIRMAN. I have already introduced them.

Senator KASTEN. I am pleased you have had a chance to meet them as well. They are fine people and I am just very, very proud to have the opportunity of introducing them to you today.

The CHAIRMAN. Well, Senator, your recommendation, of course, carries great weight with this committee, and we are very pleased to have your high opinion of Justice Coffey.

There is one question I want to ask you, Judge Coffey. The highest court you served on in Wisconsin is the supreme court; that is the appellate court. Now, the circuit court there—is that the highest trial court?

Justice COFFEY. Yes, sir.

The CHAIRMAN. That is the same name we use in South Carolina, circuit court. In some places, they call it—Georgia, for instance—superior court and different things. But that is the court of unlimited jurisdiction?

Justice COFFEY. Yes, sir.

The CHAIRMAN. It carries the power of death in criminal matters, and unlimited in civil matters?

Justice COFFEY. Yes, sir. The Wisconsin statutes provide for a maximum sentence of life imprisonment. The trial court I served on for 17½ years was known as the circuit court and was a court of unlimited jurisdiction.

The CHAIRMAN. Well, you appear to have a fine record, Judge, and I do not think you will have any trouble being confirmed and we wish you happiness and success in your tenure of office.

Justice COFFEY. Thank you so much for the opportunity of appearing before you.

The CHAIRMAN. You are now excused, if you wish to leave.

Senator KASTEN. Thank you, Mr. Chairman.

Justice COFFEY. Thank you.

NOMINATION OF WILLIAM W. CALDWELL, GLENN E. MENCER, AND CAROL LOS MANSMANN

The CHAIRMAN. Our next judges are all from Pennsylvania, if they will come around and have seats.

Senator HEINZ. Mr. Chairman, would you like our nominees to come up?

The CHAIRMAN. Yes, I would like for all three of them to come around.

Senator HEINZ. All right.

The CHAIRMAN. Judge William W. Caldwell, of Pennsylvania, to be U.S. district judge for the Middle District of Pennsylvania. Where is Judge Caldwell?

Judge CALDWELL. I am Judge Caldwell, sir.

The CHAIRMAN. Judge Glenn E. Mencer, of Pennsylvania, to be U.S. district judge for the Western District of Pennsylvania; Prof. Carol Los Mansmann, of Pennsylvania, to be U.S. district judge for the Western District of Pennsylvania.

We have three Pennsylvania judges; it is unusual to have that many from one State at one time.

Senator HEINZ. And they are all good, Mr. Chairman. [Laughter.]

The CHAIRMAN. I will ask you judges to stand and take the oath; that the testimony you will give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God.

Judge CALDWELL. Yes.

Judge MENCER. Yes.

Professor MANSMANN. Yes.

The CHAIRMAN. Please be seated.

We are very pleased to have the able, distinguished, and handsome Senator from Pennsylvania here. I am sure he has some remarks of one kind or another to say about you, and we would be very pleased to hear them at this time.

Senator HEINZ. Mr. Chairman, thank you very much. We are all very honored to be before your committee. Before I make any remarks, let me just, for each in turn, recognize the family members accompanying each of our distinguished nominees.

Judge Caldwell, why do you not indicate the members of your family.

The CHAIRMAN. If you will introduce them, we will have them stand if they care to.

Judge CALDWELL. Senator, I appreciate that opportunity. I am very pleased to present my wife, Janet; my children, William III, Ann, Mark, and Adam; my mother, Mrs. Thomas D. Caldwell, Sr.; my sister and brother-in-law, Mr. and Mrs. Gilbert Difenderfer; my brother and sister-in-law, Mr. and Mrs. Thomas D. Caldwell, Jr.; and my secretary and her husband, Mr. and Mrs. Bertram Olley.

Thank you very much.

Senator HEINZ. Judge Mencer, would you care to introduce those who accompany you?

Judge Mencer. Unfortunately, Senator, I have no members of my family here today, but I am grateful that Judge Caldwell and his family have adopted me for the day. [Laughter.]

Senator HEINZ. Professor Mansmann?

Professor MANSMANN. It is a great honor to present to you, Senator, my husband and former law partner, Jerry Mansmann; my three children, Casey, Megan, and Patrick Mansmann. Also with us today is a very dear friend of mine who came in from Texas, a lifelong friend, Joan Gabler, and her daughter, Susan; and also an attorney with my husband's staff and close friend, Melanie DiPietro, and members of her family.

The CHAIRMAN. We are very pleased to have all of you fine people here today for this hearing, and I know these appointees appreciate your presence in showing an interest in their appointments here to the Federal bench.

Senator, we would be very glad to hear from you.

STATEMENT OF HON. JOHN HEINZ, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator HEINZ. Mr. Chairman, I will make some very brief remarks. Before I start, I want to comment on something you mentioned, which is that it is unusual to have three judges up at one time. The reason we have this batch system to a certain extent is because of the merit selection procedure that Senator Specter and I use in the State of Pennsylvania.

As we were having our picture taken outside, Carol Mansmann said to me, "You know, merit selection is a lot more time and trouble than other systems; it is a lot more difficult than just telling someone that they are going to be the next nominee for a judicial vacancy." But she said, "It really produces good results."

Indeed, I am very proud of the results of our judicial nominating commission. It was a commission that Senator Schweiker and I established 5 years ago when we had a Democrat in the White House, Jimmy Carter. And people said then, "Well, I guess it is to be expected that Republican Senators would have a procedure like this if there is a Democratic President, but they certainly would never maintain it if there was a Republican President."

Well, Senator Specter and I decided that although we had elected a Republican President, the system had worked extraordinarily well for the previous 4 years and we maintained that system in effect, even though many people said it would not happen if there was a Republican President.

The result today, Mr. Chairman, is really a privilege and a pleasure to introduce to the Judiciary Committee these three nominees for appointment to the U.S. district court.

The CHAIRMAN. Could I ask you one question before you begin? How is this commission selected?

Senator HEINZ. Senator Specter and I each appoint seven members of the commission, and each of us has agreed not to appoint more than four—there cannot be a majority of Republicans or a majority of Democrats on the committee; it is a bipartisan committee.

The CHAIRMAN. There cannot be, say, a majority of either party?

Senator HEINZ. That is right; there cannot be a majority of either party. You could have seven Republicans and seven Democrats.

The CHAIRMAN. How long do they serve?

Senator HEINZ. There is a series of terms that are set forth in the charter of the commission, and if the chairman would find it helpful, Senator Specter and I would be very pleased to send the committee a copy of the charter of the commission.

The CHAIRMAN. I think it would be nice if we could just have it for our records, not put it in this record, but just filed with the committee, because some States have merit selection and others do not, and this seems to work quite well in Pennsylvania, I understand.

Senator HEINZ. This has worked extremely well, I am convinced, and I think Senator Specter shares with me the enthusiasm for the incredibly high quality both of the people we have here today, but also the people who applied and whose other names were submitted. It was an extraordinarily able group of people all the way around.

The CHAIRMAN. You may proceed now, Senator.

Senator HEINZ. Mr. Chairman, two of the nominees today are for the western district of Pennsylvania and one is for my State's middle district. All three nominees are extremely well qualified for the Federal bench. I obviously urge the committee to confirm their appointments.

Let me say a word about each. Glenn Mencer, in the middle, from Smethport, currently sits on the Commonwealth Court of Pennsylvania. Prior to ascending to that court, Judge Mencer was the president judge of the McKean County court of common pleas, a district attorney, and maintained a private legal practice.

Judge Mencer will bring 18 years of judicial experience to the Federal bench, along with an outstanding reputation for fairness and hard work.

Carol Mansmann, of Pittsburgh, is the first woman ever to be nominated for a seat on the western district court of Pennsylvania. Let me say that while it has been a long wait, women in Pennsylvania could not have a better representative.

Mrs. Mansmann began her career as a clerk to Judge Ralph Smith of the Allegheny Court of Common Pleas; served as an assistant district attorney in Allegheny County, where she argued several cases before the Supreme Court. Mrs. Mansmann has also been in the private practice of law, taught at the Duquesne University School of Law, and been a special assistant attorney general for the State of Pennsylvania. Mrs. Mansmann, too, will bring the western district court strong academic and practical experience.

William Caldwell, of Harrisburg, to my immediate left, has been a judge on the Dauphin County court of common pleas since 1970. Prior to that time, he practiced with a medium-sized firm in Dauphin County. Judge Caldwell is a highly respected jurist who is president of the Pennsylvania Conference of Trial Judges.

In addition to his fine work in court, Judge Caldwell is extremely active in community service organizations. I can recommend him highly and with nothing but the highest commendation to this committee.

Mr. Chairman, I said earlier that all three of these nominees were selected by a bipartisan merit selection commission established by my colleague, Senator Specter, and me. That commission actively sought out qualified candidates in both districts. They interviewed all applicants; they recommended each of these individuals as being among the very, very best qualified for the appointment to the Federal bench.

Our commission has been successful, I believe, in taking politics out of the appointment of Federal judges in Pennsylvania. It is no longer, to be a judge in Pennsylvania, a question of who you know; it is a question of what you know and what your qualifications are. The result for the people of Pennsylvania are judges like these three nominees before the committee today, who possess outstanding qualifications and abilities, and are beholding to no one for their appointment.

I am pleased, together with Senator Specter, to have implemented that system in our State. I commend these three nominees to the Judiciary Committee as examples of the kind of outstanding individuals who can become judges under a system of merit selection.

Our commission deserves a great deal of thanks because the people that they have sent us reflect great credit, I believe, on our commonwealth and the people of our State.

I thank you, Mr. Chairman, for this opportunity to appear here.

The CHAIRMAN. We are very glad to have you with us, Senator, and get your high opinion of these three appointees.

Now, the other Senator from Pennsylvania, Senator Specter, is a member of this committee. He is a distinguished and highly respected member of our committee.

Senator, do you want to come up here or stay down there?

Senator HEINZ. Why do you not move over here? I have to go to Senate Finance.

Senator SPECTER. I will stay here, Mr. Chairman.

The CHAIRMAN. Now, Senator, anything you have got to say about them, we will be glad to hear from you.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Well, Mr. Chairman, in the light of Senator Heinz' comprehensive statement, there is really no need for me to say anything more. But in the tradition of the Senate, I shall not be bound by that. [Laughter.]

I shall be extremely brief. The one comment that I would like to make as to these three superbly well qualified candidates is that each has a background not only in the general practice of law and in judicial qualifications, but also in law enforcement. That is a qualification which I look at specifically.

Judge Mencer was district attorney of McKean County from 1956 to 1964. Judge Caldwell was first assistant district attorney of Dauphin County from 1960 to 1962. Judge-to-be Mansmann was assistant district attorney of Allegheny County from 1968 to 1972.

I know, Mr. Chairman, that you share my high regard for the law enforcement role of the judicial process, and I believe that such experience gives these three nominees for the Federal bench a good

background and a diversified background. I also believe and agree with Senator Heinz that the approach of the selection panel to avoid the issue of partisanship in politics is very wise.

I shall not comment further.

At this point I will join you, Senator Thurmond, and assume my other role at this hearing, although with an explicit statement that I have my mind made up on these three particular nominees.

The CHAIRMAN. I believe you are a little prejudiced in their favor, Senator.

Senator SPECTER. Yes, sir. [Laughter.]

TESTIMONY OF WILLIAM W. CALDWELL, NOMINEE, U.S. DISTRICT JUDGE, MIDDLE DISTRICT OF PENNSYLVANIA

The CHAIRMAN. We would be very glad to have you come up and join us.

I just have a few questions of each. Now, I am not going into the backgrounds, as we put all of that in the record.

Judge Caldwell, at the time I was Governor of South Carolina, in my first 2 years there was a gentleman from Florida who was Governor by the name of Caldwell. Are you related to him?

Judge CALDWELL. I regret to say I am not, sir.

The CHAIRMAN. You have some facial resemblances and I just wondered if you were related.

Judge Caldwell, I believe you held the office of common pleas court judge since November 1969. This is, as I understand it, the county trial court of original jurisdiction and covers a county population of approximately 225,000 people. With this background, I feel sure you are very knowledgeable of State laws.

I wonder if you foresee any difficulty in the transition from your present office to that of a Federal district court.

Judge CALDWELL. I am sure, Senator, that I am going to require some orientation to reacquaint myself with the Federal rules of procedures and things of that nature. But I see my function as a district court judge quite parallel to the present work that I do, although dealing, of course, with Federal laws.

The CHAIRMAN. You have been doing trial work, I believe?

Judge CALDWELL. Yes; sir.

The CHAIRMAN. The common pleas court—is that the highest trial court in Pennsylvania.

Judge CALDWELL. Yes; it is. It is the court of original jurisdiction and the only level that does trial work in the State system.

The CHAIRMAN. Unlimited jurisdiction?

Judge CALDWELL. Yes, sir.

The CHAIRMAN. The power of death in criminal cases, and unlimited in civil?

Judge CALDWELL. Correct, sir.

The CHAIRMAN. So, there will be similar work that you will be doing in the Federal system?

Judge CALDWELL. I feel so, very definitely. I am a close friend of the senior judge whom I am replacing in Harrisburg, and in speaking with him I've concluded that our work is very much along similar lines; yes, sir.

The CHAIRMAN. Judge Caldwell, I consider judicial temperament a prerequisite for a Federal judge. I have seen some Federal district judges abuse jurors, abuse witnesses, and abuse attorneys, and I think it is absolutely inexcusable. The more power a man has, the more courteous he ought to be. I think the President of the United States ought to be the most humble man in this country because he has got more power than anybody else.

How do you feel about a judge exercising his power?

Judge CALDWELL. Well, I think there is only one answer to that question, Senator. There is no reason why judges cannot be as courteous as they should be and still be quite effective.

The CHAIRMAN. Judge Caldwell, Federal law now provides for United States magistrates to try civil and criminal court misdemeanor cases, with approval of the parties involved, as well as the approval of the district court judges.

Do you feel that this is the best way to relieve the heavy case load of the district courts, and are these magistrates, in your opinion, the best qualified to act in the place of the Federal district judge?

Judge CALDWELL. Senator, I am not sure that I can say it is the best way. I think it is a very good way because these magistrates should be well qualified, and can be made to be well qualified because they are selected by the judges in the particular district.

In the Middle District of Pennsylvania, the system works quite well and the magistrates do dispose of a significant number of cases. I know that they are of great help to the judges who are serving now, having had the occasion to discuss that with them.

The CHAIRMAN. As you heard me say a few moments ago, the dockets are crowded in many places. Are you willing to do a little extra work, if necessary, to clear up the dockets in your district?

Judge CALDWELL. I certainly am, sir, and I hope that my record has established that I am.

The CHAIRMAN. And are you willing to take steps to require the lawyers in your district to bring their cases to trial and get rid of them and clear up the dockets?

Judge CALDWELL. Yes. I have always felt that is one of the primary functions a judge can serve, and that is to expedite work at the trial level, which is really the purpose of the whole system.

The CHAIRMAN. Judge Caldwell, where, in your view, does a conscientious judge draw the line between judicial decisionmaking and legislative decisionmaking, and what are the criteria that you would consider in resolving whether or not a decision was the type that ought to be made by judges as opposed to an elected legislative body?

Judge CALDWELL. Personally, Senator, I am not a judicial activist in any way. I feel that the judiciary must play its role in relationship to the other two branches of Government in order to make our system effective. Judges should interpret the laws and should avoid telling people how, when, where, and why to do things.

The CHAIRMAN. Do you feel that it is the duty of the Congress to make the law and the judges to interpret the law?

Judge CALDWELL. Absolutely, I think the Congress has that responsibility and I look to the legislative branch for that function.

The CHAIRMAN. I do not think I have any other questions. Possibly Senator Specter may have some.

Senator SPECTER. Thank you, Mr. Chairman. I have no questions.

Judge CALDWELL. Thank you very much, Senator Thurmond. Thank you, Senator Specter.

The CHAIRMAN. Judge, we are glad to have you with us. You have an impressive record and I hope you enjoy your work as a Federal district judge.

Judge CALDWELL. I am sure I will, sir, and I thank you again.

The CHAIRMAN. Most cases are decided by the trial judges. I was a circuit judge in my State, which is the highest trial court in the State, and very few cases go to higher courts. So, whatever you do in your court will determine the justice that is meted out to the litigants, and I know you will take every case conscientiously and seriously.

Judge CALDWELL. Thank you, sir. I appreciate that confidence very much.

The CHAIRMAN. We now excuse you if you wish to leave.

TESTIMONY OF GLENN E. MENCER, NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF PENNSYLVANIA

The CHAIRMAN. Judge Mencer, I believe you are now a member of the Commonwealth Court of Pennsylvania.

Judge MENCER. That is correct, sir. That is an intermediate appellate court in our State.

The CHAIRMAN. That is intermediate. Now, what do you call your top appellate court?

Judge MENCER. The Supreme Court of Pennsylvania.

The CHAIRMAN. You call it the supreme court?

Judge MENCER. Yes.

The CHAIRMAN. I see you have been on this court since 1970.

Judge MENCER. Yes.

The CHAIRMAN. Prior to that, you were a trial judge?

Judge MENCER. I was on the common pleas court for 6 years and 3 months.

The CHAIRMAN. Did you try criminal cases then or just civil?

Judge MENCER. Yes, the same type of court as Judge Caldwell is now a member of. It is our court of original jurisdiction and court of record in the Commonwealth of Pennsylvania.

The CHAIRMAN. I see. Have you enjoyed your work on both courts?

Judge MENCER. Yes; I have, but I rather miss the trial experience, working with jurors and lawyers. That is one of the reasons that I am anxious to have this experience in the Federal system. Also, another reason might be that I am up for election next year, and this seems like a desirable court to be on; they tell me they do not have elections. [Laughter.]

The CHAIRMAN. Well, the appellate courts have more power in cases of appeal, but most of the cases, as I just stated, end right at the trial stage in the trial courts.

Judge MENCER. Yes.

The CHAIRMAN. And they are extremely important. To my way of thinking, there would be no judgeship more desirable than that of a trial judge. I enjoyed my experience in that respect.

Judge MENCER. That is exactly my view, and that is why I am looking forward to returning to that aspect of judging. That is the real role of a judge.

The CHAIRMAN. You are no doubt familiar with the workload which presently exists in the district courts and in the Western District of Pennsylvania. What, in your opinion, is needed to speed up the disposition of these cases? Would it be more judges and magistrates, or the change of criminal procedures, and the judges working a little harder and requiring the attorneys to work a little harder?

Judge MENCER. It may well be a combination of those, but I think you have put your finger on it at the beginning—judges who are more dedicated and conscientious, who work harder, and who keep control of the case from the beginning; early on, schedule a trial date, discourage continuances; expect things of lawyers, who set an example of being on time, being prepared, and expecting the same of lawyers.

We know that case filings in the district courts of this country have more than doubled in the period of the 1970's, and there is just more work to do than ever and judges have to be more determined to keep up with that workload. Perhaps, sometime, we are going to have to have more judges. But I agree with you, Senator, that hard work is probably the starting point.

The CHAIRMAN. Judge Mencer, do you feel that a judge should assume direct control over complex issues and complex cases in order to avoid delays and to effectually manage such cases?

Judge MENCER. Absolutely. He has to set the tone for the lawyers. He has to give them guidance; he has to indicate to them early on what is important, what he is going to consider to be controlling in the case, and what he expects, and take charge of that case and direct it with fairness to all the parties, keeping in mind his obligation to the jurors and to all those participating in the proceeding.

Senator SPECTER. Mr. Chairman, may I interrupt just 1 minute?

The CHAIRMAN. Yes, sir.

Senator SPECTER. I have just received a note from our colleague, Senator Mathias, who is presiding over a Criminal Law Subcommittee hearing, asking if I could relieve him because he has another commitment, so I am going to excuse myself.

I wonder if I might just ask one question of Judge Mencer, Mr. Chairman.

The CHAIRMAN. Go right ahead.

Senator SPECTER. And that is whether you have any intention—and let me indicate my own predisposition—to convening court for the Western District in the northwestern part of the State. I would hope that we would be able to make judicial services and court services available other than just in the big cities.

Judge MENCER. There is a Federal courthouse in Erie, Pa., and as I understand the Federal law, that is where I would be based. It is the nearest Federal courthouse to my home. That courthouse is used, but Judge Weber, who is Chief Judge of the Western District,

informs me that he would anticipate that about 25 percent of my time would be in Erie and 75 percent in Pittsburgh. However, I would actually be nearer to home; I would not object at all to having more work done in Erie.

Senator SPECTER. Well, you, of course, are from the northwestern part of the State.

Judge MENCER. Yes, that is absolutely correct.

Senator SPECTER. While there is no rule about maintaining that kind of geographical balance, that is a factor that is not ignored. I, for one, would be very interested to see that service maintained and actually promoted in Pennsylvania and elsewhere to try to bring the Federal courts closer to the litigants and the parties, to the extent that that kind of combination can be maintained.

Judge MENCER. I certainly believe that cases that originate in that area and have lawyers from that part of the district should be handled in Erie. There are facilities there for it, and if I am confirmed, there will be 10 members on the Western District; two of us will be based in Erie and the other eight in Pittsburgh. So, it seems to me that it could well be done.

Senator SPECTER. Well, I am delighted to hear that.

Thank you very much, Mr. Chairman.

The CHAIRMAN. You are excused.

Senator SPECTER. Thank you.

The CHAIRMAN. Judge Mencer, what kind of guidelines should a judge follow in determining propriety of Federal intervention in State affairs, and are you concerned about strong advocates of public issues being appointed to the Federal bench?

Judge MENCER. Yes, I am concerned. I think that the Federal courts have been too active and too willing to become involved in matters which are not particularly Federal questions or are not covered, really, under the diversity of jurisdiction aspect of the court. They have been result-oriented in many of their approaches to the problems.

I think that the district courts need to limit themselves to matters strictly before the court and to Federal questions alone, leaving the State questions to State forums.

The CHAIRMAN. Do you feel the States should be allowed to run their own institutions without interference from the Federal Government?

Judge MENCER. I do, Senator.

The CHAIRMAN. Well, you are a judge after my heart. [Laughter.]

Do you believe it would be helpful to you as a district court judge to have a sentencing commission to establish uniformity in sentencing?

Judge MENCER. I am not certain that it would. I believe sentencing is one of the most difficult things a judge does. He has many things to consider and agonize over, but I believe that justice in this country is best when we have individual justice.

Equal justice cannot be equitable to equal treatment. One has to review the potential for rehabilitation and consider what the guilty defendant has done—his record, his past, and many things. I believe that this is something that, by the nature of our system, we must entrust to the good, sound judgment and discretion of the sentencing judge.

The CHAIRMAN. In the new Federal Code we are getting out, we are setting some guidelines, and if they go over or under those guidelines, then they would have to explain why they did that.

Judge MENCER. I think this is helpful, but I think that, for instance, mandatory sentences seem to me to be too restrictive of the judge. Putting some limits and guidelines—certainly do not object to that, but I think in the final analysis, the sentencing judge has the responsibility and must determine what is the proper sentence.

The CHAIRMAN. Well, we are glad to have you with us and we hope you will enjoy your service on the bench, and wish you good luck.

Judge MENCER. Thank you, Senator. It has been a pleasure to be here.

The CHAIRMAN. You are now excused if you would like to leave.

TESTIMONY OF CAROL LOS MANSMANN, NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF PENNSYLVANIA

The CHAIRMAN. Now, we come to the best-looking of the three judges, Professor Carol Los Mansmann.

Professor MANSMANN. Well, thank you, Mr. Chairman.

The CHAIRMAN. I believe, Professor Mansmann, that you are a law professor at Duquesne University School of Law?

Professor MANSMANN. That is correct.

The CHAIRMAN. And you have been since 1974?

Professor MANSMANN. That is correct, sir.

The CHAIRMAN. You have an impressive record there and you come recommended highly. I just have a few questions.

Professor Mansmann, as a Commissioner for the Pennsylvania Commission for Women, you have been active in projects designed to alter the rules of criminal procedure for the protection of victims in rape trials. You have also drafted legislation on issues that have an impact on women.

Would you tell the committee what you believe to be some of your more important legislative proposals and the status of those proposals?

Professor MANSMANN. Yes, Mr. Chairman. We have, since 1971, had an amendment to our Constitution that is an equal rights amendment. And the Governor, in enpaneling the Commission and in appointing Commissioners, has asked us to look closely at legislation which impacts on women and which may, in fact, not be sex-neutral and which may, in fact, be sex-discriminatory.

So, we have recommended, first of all, that there are language changes that have to be made in the statutes. In fact, we have had specific proposals in joint custody, for example. We are very much concerned with family life and in making certain that in all cases what is best for the child comes forth and that both parents have full opportunity to be with their child and to raise them.

We have been instrumental in the divorce reform bill in Pennsylvania and in public accommodations. As you mentioned, we have been concerned lately with questions of criminal rape and making certain that the victim herself is not put on trial when she comes forward in rape trials.

So, we have recommended to the legislature some specific proposals to make certain that the cases are speedy, that the integrity of the system is not jeopardized in any way, and that the victim herself can come forward safely and tell her story.

The CHAIRMAN. Thank you.

Professor, you appear weekly on a Pittsburgh television program called "Starting Today."

Professor MANSMANN. Yes, that is correct.

The CHAIRMAN. The primary purpose of this program, as I understand it, is to discuss common legal issues. Would you give the committee your views, both pro and con, on television coverage in the courtroom?

Professor MANSMANN. Yes, I would be happy to, Mr. Chairman. On the plus side of having cameras in the courtroom, I would say that, first of all, the public's right to know, and to know accurately, is enhanced by having essentially the television cameras there that can show first-hand to the public what is happening and, in fact, in many respects, might be seen as a deterrent in criminal trials. People would see what the punishment is and how it is meted out and what, in fact, is the experience in going to court.

On the negative side, as a law professor, I require first-year students to sit in the jury box and to sit on the witness stand in mock trials, because the experience is very different. I am very much concerned that with the cameras running, the witnesses might be very concerned with how they are coming across rather than the truth of what they are saying; that the jurors, in fact, may give more emphasis to the case on one side or the other by virtue of the fact that the cameras are running.

I have, in fact, seen situations where witnesses who would have come forward might have been very hesitant if they thought that a camera would be on them and that their best side might not be shown and the truth of what they are saying might not come forward.

So, I would suggest that if, in fact, the Federal judiciary does come forward with cameras in the courtroom, that we receive specific guidelines and that the media receive specific guidelines, so that we all fully understand that it is the integrity of the judicial process that comes first; it is the rights of the accused that we must be concerned with. And, obviously, the speedy trial aspects cannot be ignored.

The CHAIRMAN. Professor, what are the standards that you will use in deciding that your court had a continuing administrative responsibility to oversee the implementation of one of its orders?

Professor MANSMANN. I would begin by saying, Mr. Chairman, I feel very strongly that the case before me is the case that involves those litigants and only those litigants; that far-reaching or wide-reaching implementation should not occur unless it is absolutely necessary by virtue of the parties before me.

I would state also that I would expect that, again, the integrity of the court's orders would be upheld. I would make certain that counsel understood that the orders are final; that the implementation of them must be swift. And it would only be under circumstances when I felt that there was a continuing controversy that was not final or I had reason to believe that the implementation of

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the order, though absolutely necessary, might cause additional litigation, that I would continue to preside over a matter before me.

The CHAIRMAN. Professor, how would you resolve a conflict between your own conscience or your own sense of justice and the clear meaning of a statutory or constitutional provision?

Professor MANSMANN. There is not any doubt in my mind, Mr. Chairman, that my own personal viewpoints on any particular subject are simply that; they are personal, they have no bearing upon the decisions I would make. Certainly, if there is clear meaning to a statute, I am under the sworn oath and obligation to uphold the meaning of that statute and the constitutionality of it.

As I mentioned, while it might give me a sleepless night, certainly my own oath to the Constitution of this United States would serve me in moving forward on the clear meaning of that statute.

The CHAIRMAN. Professor Mansmann, finally, in your opinion, are the protections afforded by the Bill of Rights self-executing in the sense that courts may adjudicate claims arising thereunder, or must Congress affirmatively act to provide enforcement mechanisms for these provisions?

Professor MANSMANN. I think, Mr. Chairman, that there are definitely some provisions that are self-executing. However, if Congress has spoken, that is the clearest and best guideline for Federal courts.

To give you an example, if Congress had not spoken on employment discrimination with title VII, then the Federal judiciary would have the equal protection clause to work with, or due process. But where Congress clearly has spoken and given us guidelines as far as Title VII is concerned, it is certainly the best and clearest source of information for us.

The CHAIRMAN. Now, are you willing to work a little longer to help clear up dockets in your district?

Professor MANSMANN. I most certainly am, Mr. Senator. My own personal background, the work that I have had, my own upbringing and the commitment to hard work certainly serve me well in this role.

The CHAIRMAN. Do you consider yourself an activist or do you feel that it is the duty of the Congress to make the law and it is the judges' duty to interpret the law?

Professor MANSMANN. There is no doubt in my mind that it is clearly the role of the Federal judiciary to interpret the law, as given to us through the Constitution and, most clearly, through Congress.

The CHAIRMAN. I think that covers the questions I have. I wish you great success on the bench, and I am very pleased to see a fine lady like you appointed to the bench. I am glad to see the President appointing some women to the bench.

I think that concludes your hearing and you are now excused, and that completes the hearing at this time. So, the meeting now stands adjourned.

Professor MANSMANN. Thank you very much.

[Whereupon, at 11:13 a.m., the committee hearing was adjourned.].

BIOGRAPHIES

JOHN L. COFFEY

NOMINEE, U.S. CIRCUIT JUDGE, SEVENTH CIRCUIT COURT OF APPEALS

Birth: April 15, 1922, Milwaukee, Wis.
Legal residence: Wisconsin.
Marital status: Married to Marion Kunzelmann Coffey, 2 children.
Education: 1939-43—Marquette University, B.A. degree; 1946-48—Marquette University College of Law, J.D. degree.
Bar: 1948—Wisconsin.
Military service: 1943-46—U.S. Navy.
Experience: 1948-54—Assistant city attorney, city of Milwaukee, Wis.; 1954-60—County civil court judge, Milwaukee County; 1960-62—Municipal court judge, Milwaukee County; 1962-78—Circuit court judge, Milwaukee County; 1978 to present—Justice, Wisconsin Supreme Court.

WILLIAM W. CALDWELL

NOMINEE, U.S. DISTRICT JUDGE, MIDDLE DISTRICT OF PENNSYLVANIA

Birth: November 10, 1925, Harrisburg, Pa.
Legal residence: Pennsylvania.
Marital status: Married to Janet W. Garber Caldwell, 4 children.
Education: 1945-48—Dickinson College, A.B. degree; 1948-51—Dickinson School of Law, LL.B. degree.
Bar: 1952—Pennsylvania.
Military service: 1944-45—U.S. Air Force.
Experience: 1951-70—Caldwell, Fox & Stoner, Harrisburg; 1960-62—First Assistant district attorney, Dauphin County (part-time); 1962-63—Pennsylvania Power Company, Harrisburg, house counsel; 1963-70—Board of Arbitration of Claims Counsel and then chairman; 1970 to present—Common pleas court, Dauphin County, judge.

GLENN E. MENCER

NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF PENNSYLVANIA

Birth: May 18, 1925, Smethport, Pa.
Legal residence: Pennsylvania.
Marital status: Married to Hannah Freyer Mencer, 3 children.
Education: 1946-49—University of Michigan, BBA degree; 1949-52—University of Michigan School of Law, J.D. degree.
Bar: 1953—Pennsylvania.
Military service: 1943-45—U.S. Army.
Experience: 1952-53—E. G. Potter, Smethport, Pa., law clerk; 1953-64—Private practice, Eldred, Pa.; 1956-64—District attorney, McKean County, Pa.; 1964-70—President judge of the 48th Judicial District, McKean County, Pa.; 1970 to present—Judge, Commonwealth Court of Pennsylvania.

CAROL LOS MANSMANN

NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF PENNSYLVANIA

Birth: August 7, 1942, Pittsburgh, Pa.
Legal residence: Pennsylvania.
Marital status: Married to J. Jerome Mansmann, 3 children.
Education: 1960-64—Duquesne University, BA degree; 1964-67—Duquesne University School of Law, J.D. degree.
Bar: 1967—Pennsylvania.
Experience: 1967-68—Law clerk to Hon. Ralph H. Smith, Jr., Court of Common Pleas, Allegheny County, Pa.; 1968-72—Assistant district attorney, Allegheny County; 1973-74—Mansmann & Mansmann, partner; 1974-79—Special assistant attorney general, Commonwealth of Pennsylvania; 1974 to present—Law professor, Duquesne University School of Law.

CONFIRMATION HEARING ON ROBERT E. COYLE

WEDNESDAY, MARCH 24, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The committee met, pursuant to notice, at 2 p.m., in room 2228, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

NOMINATION OF ROBERT E. COYLE

The CHAIRMAN. Stand up and be sworn, please.

Will the testimony you give in this hearing be the truth, the whole truth and nothing but the truth, so help you God?

Mr. COYLE. Yes.

The CHAIRMAN. Have a seat.

Mr. SHORT. Is Senator Hayakawa on the way, Mr. Coyle?

Mr. COYLE. Pardon me, sir?

Mr. SHORT. Is Senator Hayakawa on the way?

Mr. COYLE. I was told he was.

The CHAIRMAN. Mr. Coyle, do you have any of your family here you want to introduce?

TESTIMONY OF ROBERT E. COYLE, NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF CALIFORNIA

Mr. COYLE. No, sir, I do not; I am by myself.

The CHAIRMAN. I believe you were born in Fresno, Calif. You are married and have three children; A.B. degree from Fresno State College and a J.D. degree from the University of California Hastings College of Law. You were admitted to the bar in 1956.

You served as deputy district attorney for the county of Fresno, and you are with the law firm of McCormick, Barstow, Sheppard, Coyle & Wayte of Fresno, Calif.

Mr. COYLE. That is correct, sir.

The CHAIRMAN. Speaking of Sheppard, which Sheppard is that?

Mr. COYLE. It is W. W. Sheppard.

The CHAIRMAN. I know a Mr. Gerald Sheppard.

Mr. COYLE. No, no relation.

The CHAIRMAN. Senator Hayakawa, come around. Before we question the witness, we will be very glad for the distinguished and able and scholarly Senator from California, Senator Hayakawa, to make a presentation if he cares to do so.

STATEMENT OF HON. S. I. (SAM) HAYAKAWA, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator HAYAKAWA. Thank you, Mr. Chairman. I am sorry to be late, but you are awfully prompt.

Mr. Chairman, it is my pleasure to introduce to the committee Mr. Robert E. Coyle, nominated for the position of judge for the eastern district of California. Mr. Coyle has earned the respect of the community where he was born, has worked, and will, with the approval of the Senate, serve as a district judge.

A native of Fresno, Calif., he graduated from Fresno State College in 1953 and received his juris doctorate degree from the Hastings College of Law in 1956. He is currently a partner in the Fresno law firm of McCormick, Barstow, Sheppard, Coyle & Wayte, and serves on the board of governors of the State bar of California.

The Fresno community knows Robert Coyle not only as a man devoted to the law, but as a family man and an active community leader. I believe that as a U.S. district judge, he will continue to make important contributions to Fresno and to the eastern district.

Mr. Chairman, it is my very great privilege to introduce Mr. Robert E. Coyle to the committee at this time.

The CHAIRMAN. Thank you very much, Senator. We are delighted to have you with us. As I understand, you are recommending Mr. Coyle.

Senator HAYAKAWA. Yes, indeed.

The CHAIRMAN. You stand behind him?

Senator HAYAKAWA. Yes, indeed, I do.

The CHAIRMAN. You feel that he would make an excellent judge and you are asking this committee to confirm him?

Senator HAYAKAWA. I do wish to have him confirmed. As you may know, we have a very strong committee of some 30 citizens, lawyers, and judges from all over California to pass on our judicial recommendations. Mr. Coyle, along with many, many others, had his record thoroughly examined and he came out at the top of the list of those from this district who were recommended for this appointment. So, we recommend him in the highest terms.

The CHAIRMAN. And he bears your strong endorsement?

Senator HAYAKAWA. Yes, sir.

The CHAIRMAN. We are delighted to have you with us, and we have a few questions for Mr. Coyle. If you wish to stay, we will be glad to have you. If you wish to go, you may be excused.

Senator HAYAKAWA. Thank you very much. I would like to stay.

The CHAIRMAN. Mr. Coyle, you were active, I believe, in forming the Fresno County Legal Services, Inc., and later served as chairman of the board of directors of that organization.

With this background, do you feel that an individual lacking sufficient financial resources to hire an attorney still has satisfactory access to adequate legal representation?

Mr. COYLE. I suppose, Senator, much depends on the priorities of what is described as "adequate legal representation." Much of the, I would say, rank and file of people who need representation probably have difficulty getting representation. The priorities I have referred to are what methods or which avenues the legal services are going to channel their efforts in, whether it be in the class-action

type or the individual type. To me, the individuals are being slighted to the other end of the spectrum.

The CHAIRMAN. Mr. Coyle, would you describe the arrangements you have made to dissolve your financial interest in your law firm?

Mr. COYLE. Our arrangements are set by our partnership agreement, which provides, upon withdrawal—it is agreed upon what your work in progress would be, without an accounting or without determining what the actual work in progress is. So, upon the termination or withdrawal of a partner, the amount of money is then set by taking the last 11 years' net income, dropping out the highest year and averaging the 5 highest years. It would be paid out over a 3-year period.

The CHAIRMAN. You have no arrangements for compensation for pending legal work?

Mr. COYLE. There is none.

The CHAIRMAN. Mr. Coyle, you have been active, I believe, in many youth groups, such as little league baseball, the Boy Scouts, the Fresno Junior Soccer League, and so forth. You have shown not only concern for the legal rights of children, but also the welfare of children in general.

Do you feel that the present laws pertaining to child pornography are adequate to protect children, and would you encourage increased enforcement in this area?

Mr. COYLE. In answer to the last part of your question first, I would encourage increased enforcement. I suppose that most of my knowledge about the actual laws regarding child pornography comes from the moods you hear of additional exploitation of children, and I am certainly against that.

The CHAIRMAN. Do you feel that the laws are adequate now on pornography?

Mr. COYLE. No. I want to make it clear I am not that knowledgeable of the laws themselves. I am certainly knowledgeable of what one reads and what one hears and the avenues in which certain people apparently feel we should be going, and I do not feel we should be going in that direction.

The CHAIRMAN. Do you know of any reasons why communities should expose children to indecency and obscenity and pornography?

Mr. COYLE. I do not, Senator, and I am happy to say I have not found that to be a problem in our community.

The CHAIRMAN. What was that?

Mr. COYLE. I have not found that to be a problem in our community, and I certainly can see no reason for it to be in existence.

The CHAIRMAN. In response to a portion of the committee's questionnaire concerning judicial activism, I believe you stated,

> I do not feel it is the place for the Judicial to impose duties and obligations upon government and society, nor to take on the additional burden of administering institutions other than the Judiciary itself. The burdens of administration of justice are quite enough.

Now, Mr. Coyle, can you foresee any circumstance where your court would have a continuing administrative responsibility to oversee the implementation of one of its orders, and if so, what are the standards that you would use in deciding that such a responsibility did, in fact, exist?

Mr. COYLE. Senator, if the question entails the taking over of some institution or some operational portion of Government, the answer would be no, I would not see any basis for so doing, unless it were just in the ordinary course of operating a court, such as receiver, or something of that sort, but not in control of an institution.

The CHAIRMAN. Do you see any reason why Federal judges should take over the running of schools and the running of hospitals and the running of other institutions that belong to the States?

Mr. COYLE. No, sir.

The CHAIRMAN. Are not the State people as interested as a judge would be in those matters?

Mr. COYLE. I would think so.

The CHAIRMAN. Mr. Coyle, I believe you coauthored an article which appeared in the Hastings Law Journal, "The Rights of an Adopted Child to Inherit under the California Probate Code." In this article, you say that in order to appreciate the true significance of the code section you were addressing, one must review the past acts of the legislature, which could, however, only be accomplished in light of legislative intent coupled with judicial construction, given the section in cases applying it.

Now, if you are confirmed as a Federal District Court Judge, do you feel there are ever any circumstances where you would consider it appropriate to decide a case on some basis other than one where the intent of the framers of legislation or constitutional provisions can be detected either through the text of a provision or its surrounding legislative history?

Mr. COYLE. No. I believe that the intent, if available, of the framers is what should dictate the decisions and rulings of the court.

The CHAIRMAN. Mr. Coyle, the phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues not properly within the scope of their authority. What does the phrase "judicial activism" mean to you, and do you believe the Constitution says what it says and means what it says?

Mr. COYLE. Once again, in answering the latter part of your question first, I do believe that the Constitution means what it says and says what it means.

As far as judicial activism, my own definition of it would be those who, through judicial position, legislate, change legislation, or do not feel constrained by the laws on the books or the interpretation given to them by the higher courts.

The CHAIRMAN. Is there any statement you would like to make to the committee at this time?

Mr. COYLE. None, Senator, other than to thank the Committee for its time and thank those who have had the confidence to follow my nomination to this point. I thank them.

The CHAIRMAN. I have seen some judges in a courtroom who appeared arrogant and would not hesitate to embarrass witnesses or lawyers or jurors, and others. I feel that a judge has so much power, he ought to be vey humble. He ought to be very respectful of people all the time.

What is your attitude?

Mr. COYLE. Having spent most of my time trying lawsuits and having observed some of the concerns of the Senator, I would agree *one hundred percent.*

The CHAIRMAN. Is there ever any excuse for a judge to do otherwise? In other words, do not the people look on the judge as being exemplary in his conduct in the courtroom and conduct in general?

Mr. COYLE. I would certainly hope so.

The CHAIRMAN. And they look upon him as setting the kind of standards they feel other people could follow.

Mr. COYLE. I would certainly hope so; that our justice system will continue with that respect.

The CHAIRMAN. Now, if you find your docket out there is overcrowded and cases are not being tried promptly, and because justice delayed sometimes is justice denied, are you willing to work a little extra to try and clear up those dockets and get them in shape and keep them in shape?

Mr. COYLE. Yes, sir. Having been outspoken in that regard for those who are on the bench already, I feel I would have to follow that commitment once on the bench.

The CHAIRMAN. I do not think I have any other questions. We are glad to have you with us, and with the strong backing here of Senator Hayakawa, I think you will be confirmed promptly, and we wish you success and happiness in your service on the bench.

Mr. COYLE. Thank you, Senator, and Mr. Short.

Senator HAYAKAWA. Thank you, Mr. Chairman.

The CHAIRMAN. The committee stands adjourned.

[Whereupon, at 2:15 p.m., the committee was adjourned.]

BIOGRAPHY

ROBERT E. COYLE

NOMINEE U.S. DISTRICT JUDGE, EASTERN DISTRICT OF CALIFORNIA

Birth: May 6, 1930, Fresno, Calif.

Legal residence: California.

Marital status: Married to Faye Turnbaugh Coyle, 3 children.

Education: 1948-53—Fresco State College, A.B. degree; 1953-56—University of California Hastings College of Law, J.D. degree.

Bar: 1956—California.

Experience 1956-58—Deputy district attorney, county of Fresno; 1958 to present—McCormick, Barstow, Sheppard, Coyle & Wayte, Fresno, Calif.

CONFIRMATION HEARING ON:

MICHAEL A. TELESCA, WALTER E. BLACK, JR., WILLIAM T. HART, AND JOHN A. NORDBERG

WEDNESDAY, MARCH 31, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:05 p.m., in room 2228, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Also present: Senator Mathias.

Staff present: Duke Short, chief investigator; Bill Christensen, investigator; Allan Spence, investigator; Pamela Swanner, clerk; Michael Klipper, chief counsel, Criminal Law Subcommittee; Maura Whelan, legislative aide; and Gordon Hawk, professional staff member.

NOMINATION OF MICHAEL A. TELESCA

The CHAIRMAN. The committee will come to order.

We have a hearing scheduled today on four U.S. district court judges. Our first nominee is Judge Michael A. Telesca, of New York, to be U.S. district judge for the western district of New York.

Mr. Telesca, if you will stand up and be sworn? Do you swear that the testimony you are about to give at this hearing shall be the truth, the whole truth and nothing but the truth, so help you God.

Judge TELESCA. I do.

The CHAIRMAN. Do you have family members with you, Mr. Telesca?

Judge TELESCA. No; I do not, Senator.

The CHAIRMAN. Well, I see you have got an able Senator there by you; I imagine he has got a few words he wants to say about you.

STATEMENT OF HON. ALFONSE M. D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator D'AMATO. Mr. Chairman, I am delighted to be here and it gives me great pleasure to recommend to you and to this committee a distinguished, superb candidate for the U.S. district court for the Western District of New York, Michael A. Telesca.

Before I recite to you the many judicial qualifications of Judge Telesca, please allow me a personal observation. I traveled to the judge's hometown of Rochester, N.Y., to make public his nomina-

tion at a major civic gathering there. I must say, Mr. Chairman, that rarely have I seen such an outpouring of affection and admiration for a man as was displayed toward Judge Telesca that evening. Perhaps the greatest endorsement of Judge Telesca comes from the many many people who know and respect him in western New York. His elevation to the bench will continue a tradition of excellence in the Western District of New York.

The judge has an awesome task before him. He succeeds a man who was literally a legend in his time, Judge Harold P. Burke. When Judge Burke retired last year, after 44 years of service on the Federal bench, he was the longest sitting judge in the history of our Republic. He was a great jurist, whose long and distinguished tenure endeared him to thousands of litigants, lawyers, and the public.

So you can see, Mr. Chairman, that when my judicial screening committee began its search for a person to replace Judge Burke, the task was difficult and the standards very high. After exhaustive examination of many well-qualified candidates it was the unanimous recommendation of the committee that Judge Telesca met these high standards.

He is a man of extensive legal background whose roots run deep in the Western District of New York. A graduate of the University of Rochester and Buffalo Law School, he has served as Monroe County surrogate judge; acting State supreme court justice; and a member of the court facilities task force.

Judge Telesca has been an active and productive member of the Rochester community, serving on the board of directors of the Rochester Association for Mentally Retarded Persons, and board of governors of Genesee Hospital.

I am deeply honored to put forward the name of Judge Telesca for this important judicial post. He is a man with the experience, the knowledge, and the temperament that make for a great judge. Because there is now a backlog of some 600 cases in the western district, I urge this committee to act quickly in favor of his nomination so that the full Senate can expeditiously confirm him.

Mr. Chairman, Judge Telesca has had a distinguished career as an acting supreme court judge, as a surrogate of Monroe County, and as a distinguished lawyer.

In addition to his legal career, he has served his Nation well as a marine during the Korean war. He is a man who is eminently qualified for the difficult task that lies ahead; judge Telesca lives up to the great standards that were set by his predecessor, Judge Harold P. Burke, who, when he retired last year after 44 years of service on the Federal bench, was the longest-sitting judge in the history of our Nation.

I think it is proper and fair that a jurist with a great career be followed by someone like Judge Telesca, who is so eminently qualified.

Allow me to again call to the attention of the committee the substantial backlog in cases that exists. Judge Telesca's work will certainly be cut out for him with over 600 cases now pending. He is certainly the kind of person who can handle that work with integrity, and the legal craftsmanship that he has developed over the

years, and with the kind of incisiveness that will be a credit to this committee and to our Nation and to our legal system.

The CHAIRMAN. We are glad to have you with us, and your high endorsement will carry great weight with the committee, Senator.

Senator D'AMATO. Thank you very much, Mr. Chairman.

The CHAIRMAN. Now, without objection, we are going to place his biography in the record; that will save a lot of questions.

Now, we have some questions. The bells are ringing for a vote in just a minute. I am going to let counsel propound these questions to you, Judge Telesca, and you can just stay where you are for a moment.

Let us see; Senator Sarbanes of Maryland, I believe, is here for Mr. Walter E. Black, Jr., of Maryland. Will you come around, Mr. Black, and hold up your hand and be sworn? The testimony you will give in this hearing will be the truth, the whole truth and nothing but the truth, so help you God.

Mr. BLACK. Yes.

The CHAIRMAN. Mr. Black, without objection, we are going to place your biography in the record.

I am going to turn this hearing over to Senator Mathias to preside. He is, of course, one of your able Senators from Maryland. I might just swear in these other two nominees while I am here. Will the other two gentlemen come around, Mr. William T. Hart and Mr. Nordberg?

Do you solemnly swear that the testimony you are about to give at this hearing will be the truth, the whole truth and nothing but the truth, so help you God.

Mr. HART. I do.

Judge NORDBERG. I do.

The CHAIRMAN. Now, in a minute I have got to leave. I am going to turn this hearing over to the distinguished Senator from Maryland, a member of our committee—a very able member—and he can preside. And if he has to leave, then counsel can propound a few questions.

Thank you very much. We are glad to have all of you gentlemen here. We will try to expedite the matter as quickly as we can.

[Whereupon, Senator Mathias assumed the chair.]

Senator MATHIAS. It is a great pleasure for the Chair to welcome Walter Black to the Judiciary Committee. He is an old friend and a good friend, although a young man and a good man. To introduce him to the committee, it is my pleasure to call upon my colleague, the Senator from Maryland, Mr. Sarbanes.

STATEMENT OF HON. PAUL S. SARBANES, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator SARBANES. Mr. Chairman and members of the committee, I am pleased to join with my very able and distinguished colleague from Maryland, Senator Mathias, in recommending the confirmation of Walter Black, Jr., of Baltimore, to serve on the U.S. district court for the district of Maryland.

Walter Black will bring to the Federal bench an outstanding record of professional practice and of public service. A graduate of Harvard College and Harvard Law School, he served as an assist-

ant U.S. attorney in the district of Maryland from 1953 to 1955 and, as the U.S. attorney in 1956 and 1957, at which time Walter was 30 years old. He was the youngest U.S. attorney in the entire country and handled that responsibility with great distinction.

He has been a very active private practitioner in our city and one of the leading members of our bar. I think it is important to point out that during his active legal career, he has been a participant in a great number of ways in our community.

He has been a responsible participant in the political process, albeit on the other side from myself, but I recognize quality when I see it. He has been chairman of the board of municipal and zoning appeals in Baltimore City, a member of the jail board of Baltimore City, a member of the mayor's task force on civil rights of the Governor's commission to revise the annotated codes, and he has participated in a whole host of civic and community organizations, where I think he has made a stellar contribution.

Both as a lawyer and as a citizen, Walter Black has demonstrated his qualifications for the position to which he has been nominated, and I am pleased to join with my colleague, Senator Mathias, in recommending his approval to this committee.

STATEMENT OF HON. CHARLES McC. MATHIAS, JR., A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator MATHIAS. Thank you very much, Senator Sarbanes.

I note that Mr. Black is the author of a thesis written while he was in the Harvard Law School, entitled "The Effect of Renunciations and Compromises." On that basis, I think it might be more appropriate if he were to join us here in the Senate than to ascend the bench. [Laughter.]

It is, as I say, a particular pleasure for the Chair to welcome Mr. Black. He is here, really, as an expression of the esteem of a distinguished group of Marylanders who surveyed those aspiring to elevation to the bench, and recommended Mr. Black, among others, to be the U.S. district judge to fill the vacancy created by the retirement of Chief Judge Northrop.

So, he appears here not only with a distinguished professional background, but with this testimony of his reputation and standing in the community, which is of enormous importance in the selection of judges. So, I take great pride in having him come before the committee as a Marylander, and the Chair is equally pleased to welcome Mrs. Black, who is accompanying him here today.

I have certain questions that I am going to ask both Mr. Telesca and Mr. Black, and I will start with Mr. Telesca. Walter, if you will just resume your seat, we will recall you in a minute.

Judge Telesca, you were elected surrogate court judge for Monroe County and have served in that capacity from 1973 until the present time. I believe this is a court that deals primarily with probate matters—the affairs of those who have died; the probate of wills, administration of trusts, and adoptions.

I am sure that you have served with distinction on that court. I wonder, however, if you foresee any difficulty in the transition from a court of this nature to the Federal district court with its broad, general jurisdiction.

TESTIMONY OF MICHAEL A. TELESCA, NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF NEW YORK.

TRANSITION TO FEDERAL JUDICIARY

Judge TELESCA. Mr. Chairman, certainly there will be a period of adjustment. There are new rules, new procedure, and new nomenclature, but in many instances the principles are the same. In surrogate court, the judge is also an administrator as well as being a judge to try issues of fact; that is the case pretty much in Federal court as well.

Senator MATHIAS. And I assume it is a bigger courthouse.

Judge TELESCA. It is a bigger courthouse.

Senator MATHIAS. We have those problems around here. We had a great Member of Congress for some years, the late Roger C. B. Morton, and he used to say that he had to join a tourist group to be guided around the building in the first year in which he served here, so that learning process is not unique to the Judiciary.

SENTENCING

Do you believe it would be helpful to you as a U.S. District Court judge to have a sentencing commission to establish uniformity in sentencing?

Judge TELESCA. It would be helpful, but not critical. I think the judge should still have the latitude to sentence in accordance with the crime and the circumstances of that particular case.

Senator MATHIAS. I am keeping one eye on the clock there, and I have reached the point now where I am going to have to jog to the floor to make this vote. I am going to have to ask you to suspend, and the committee will stand in recess until either I or Senator Thurmond can return.

[The committee was recessed from 2:22 p.m. until 2:27 p.m.]

Mr. SHORT. The committee will come to order, please.

We will now hear from Senator Percy, in the absence of the chairman. He regrets he cannot be here at this time, but he will return shortly. We are very happy to have you here, Senator Percy.

STATEMENT OF HON. CHARLES H. PERCY, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator PERCY. Thank you, Mr. Chairman. I am delighted to see that the staff has seized control and has taken over, and I would encourage more of that. Maybe we would move the Senate along a little faster. I do appreciate your courtesy very much indeed.

Having talked with enough of my colleagues, the members of this Committee, to know how they would feel, I think they share my distinct pleasure and honor in introducing today Judge John Nordberg and Mr. William Hart to the Judiciary Committee.

I recommended these two nominees to the President following a thorough search for, and consideration of some of the best legal talent in Illinois. Judge Nordberg and Mr. Hart came out of that process, which includes formal interviews and ratings by five Illinois bar associations. Both of them received absolutely top-flight ratings—rave reviews, you might say.

To briefly review the nominees' credentials, Judge Nordberg graduated from the University of Michigan Law School in 1950. Following that, he joined the firm of Pope, Ballard, Shepard & Fowle, one of our fine law firms in Chicago, where he was a partner from 1957 to 1976.

In 1976, Mr. Nordberg was elected judge of the circuit court of Cook County, where he has since served with great distinction.

Mr. Hart graduated from Loyola University Law School in 1951, served in the Judge Advocate General's Corps, and was an assistant U.S. attorney for the Northern District of Illinois. Since 1959, Mr. Hart has been with the firm of Schiff, Hardin & Waite; he is a partner there. Mr. Hart has been active in the legal community and has an excellent reputation there.

Mr. Chairman, I ask that more complete biographies of the nominees be made a part of the committee record.

Mr. SHORT. Without objection the complete biographies will be placed in the record.

Senator PERCY. I would like to just say for the benefit of the committee that when I came to the U.S. Senate, and my distinguished senior colleague was Everett Dirksen, I really, literally, was unaware of the responsibilities of a U.S. Senator in this regard.

When I learned what our responsibilities were and that we had the responsibility of making suggestions to the President for district court judges, sharing the responsibility with other States for suggestions for circuit court of appeals, and sending names up for U.S. attorneys and U.S. marshals in our various districts, I was really in awe. I then thought, well, perhaps just the senior Senator, both of us being of the same party, had that responsibility.

But I learned from the committee at that time that, no; Senators are equal; "your signature is necessary on the blue slip." I took that signature seriously, and we had quite some differences of opinion, Senator Dirksen and I, about some candidates. We amicably, over time, worked it out.

To make sure that I fullfilled my responsibilities in this regard, I established a judicial selection process 15 years ago. It has since been written about in the ABA journals, and the ABA has asked me to speak at their conventions on it. It is a system which I developed assuming that my responsibility is as great here—in fact, even greater—than the process through which I looked for a successor as chief executive officer of Bell & Howell Co. so I could move into politics.

It was a long, arduous, hard process, but I kept thinking, for someone who has put 28 years of his life into a company, and with 35,000 stockholders and 14,000 people depending on him, I had better be right, particularly considering I owned a lot of stock in that company.

I have put no less time or thought into every single judicial nominee. I always think, here is a person who has the power in the district court to render that judgment alone—and it is a lonely life—but to render that judgment alone and commit someone to jail for life. The power is just immense.

Previously, Illinois had what were called Irish seats, Italian, Greek, Jewish, and black seats. The ethnic groups felt that they really controlled this seat, and if an Italian judge died, they were

the ones to name his successor. It was a matter of political patronage.

As one Illinois State senator said when I sent up the name of a Democrat, because he was infinitely superior to any Republican I could find: "The spoils system should work, and the spoils system is our spoils system and we should get the spoils." A lot that would mean to a person standing in front of a judge ready to render a decision, if he felt that he was the product of some ethnic-balanced group or something like that; what a travesty, what a terrible thing.

I felt it was not only immoral, but bad politics in the end because the best politics, to me, is to have the finest court that you can have. And we have not always been noted in the Northern District of Illinois, for instance, to have the finest court. But over a period of 15 years, I think we have developed what is considered to be one of the finest district courts in the United States now.

And I pay great tribute to my colleague, Adlai Stevenson, who, when a Democratic President came in, adopted the same procedure and system. He did not let city hall dictate who would be the judges. The Senator kept it, and he always had the power to say to them, "Put all the pressure you want on me, but I will tell you this: Chuck Percy will never sign the blue slip," and that has preserved the system right straight through.

I have found Alan Dixon immensely cooperative in this regard. He himself is a lawyer. I am not; I am a law school dropout. After I came back from the Navy, I went to 2½ years of night school and then was elected president of Bell & Howell, and I just was not smart enough to keep up both of them. Besides, the board thought it very undignified for a chief executive officer of that company to be going to night law school.

But it gave me enough of the reverence of the law; I respect it, I admire it.

We have had for the three vacancies we have in the Northern District probably 40 possible candidates, some of whom have come forward themselves and others of whom we have drafted to come forward. The bar associations really worked hard. They are really in competition with each other to see whom they can surface as not the best politician in that bar association, but the best person regardless, because they know the process works when only the best come forward.

We have one vacancy that is still unfilled and I am still making a decision on that. But in this case, Mr. Chairman, of these two men, there just was not a shadow of a doubt. The results of my interview were exactly the same as the process of the bar associations. Their peers judged them as absolutely supreme and absolutely tops, and my own personal interviews verified that.

So, I have filibustered long enough; the Senator has not arrived yet to take over the Chair.

Mr. SHORT. We appreciate your time and interest Senator Percy.

Senator PERCY. So, I will just leave it at that. Please express my appreciation to the committee for holding this hearing and my willingness to supply any further data that they might need. But I do think the nominees can speak for themselves, and I am indeed very, very proud.

Indeed, I also asked the attitudes of their families and if they knew there were limitations on salaries and that they could earn much more elsewhere. I also asked how this fit in with their program and what were the attitudes of their children. I am very happy to say that in both cases, the families are in full support, enthusiastic, and thrilled with the opportunities that Misters Hart and Nordberg will have to render great service to the United States Government and to the President of the United States. And I am sure they will both be a credit to the President and to this committee. Thank you.

Mr. SHORT. Thank you very much, Senator Percy. With your able support, I am certain they will have no difficulty.

We will stand in temporary recess, awaiting the chairman.

[The committee was recessed from 2:38 p.m. until 2:45 p.m.]

Senator MATHIAS. The committee will come to order.

Judge, I might reflect a little bit philosophically on the favored position of the Judiciary under the United States Constitution, because since I last saw you, my salary has just been reduced by 10 percent.

So, as you enter upon your duties as a United States judge, be grateful to the founders of this Republic for the protection that they have afforded to the Judiciary.

CONFLICT OF INTEREST

Now, in responding to the committee's questionnaire, you were asked to explain how you would resolve any potential conflict of interest, including the procedure you would follow in determining these areas of concern. And you responded that you had an obligation to disclose your business relationships, which I want the record to make clear you have done.

But I wonder what action you would take, should any conflict arise other than that dealing with a business relationship in which you were involved.

Judge TELESCA. Well, if any conflict did arise concerning any case that was before me, or any of the parties or any of the attorneys, I, of course, would excuse myself; I would remove myself from the case and disqualify myself, as I have in the past, without any question. Even if there were the appearance of impropriety, I would disqualify myself.

Senator MATHIAS. If it were a matter of family association or——

Judge TELESCA. Family association, former law partners, and all of those obvious connections.

ACCESS TO FEDERAL COURTS BY STATE PRISONERS

Senator MATHIAS. In 1980, prisoner petitions comprised approximately 14 percent of all district court civil litigation filings. Various proposals have been made to limit collateral attacks on convictions, including additional requirements calling for complete exhaustion of State remedies, time limitation on the filing of petitions, and eliminating magistrates' authority to hold evidentiary hearings.

Do you feel that there is a need to alter the degree of access to Federal courts by State prisoners, and if so, how would you recommend that it be done?

Judge TELESCA. Well, I feel that the Congress should enact legislation that clearly gives the situation some sense of finality in the State courts so that the Federal courts are not burdened by this.

I am not saying for a moment that the Federal courts should not be an access to prisoner grievance, but I think there should be some element of finality. As Yogi Berra said, the game is never over until it is over, and it seems that in criminal cases it goes on and on and on, and I think the public is entitled to some degree of finality.

Senator MATHIAS. Would you agree with me, however, that there would a danger if the Congress were to close the courthouse doors too tightly?

Judge TELESCA. Sometimes, yes, sir.

Senator MATHIAS. There is that common sense that should govern our activities. I think if the Congress attempted to nail the courthouse doors closed against all prisoners, we would be running into serious constitutional problems.

Judge TELESCA. And perhaps anarchy.

JUDICIAL ACTIVISM

Senator MATHIAS. Now, you have informed the committee that the Judiciary should not impose itself upon other institutions in the role of an administrator with continuing oversight responsibility; that judges should resist the temptation and the natural tendency to believe that their individual solutions to certain social problems are better and more workable than those persons who are trained in running a particular institution, such as a prison system or a school system.

Can you foresee any circumstance where your court would have a continuing administrative responsibility to oversee the implementation of its orders?

Judge TELESCA. I cannot at this moment foresee it, but if it meant carrying out a previous order of the court for such implementation, of course, I would be obligated to carry it out.

The natural tendency is for the institutions to work out their problems on their own. If they cannot and have violated some law, I certainly would be open to that.

Senator MATHIAS. What about this kind of a situation, which is a real-life situation that Mr. Black will remember, where you had congressional districts of widely varying size? In the State of Maryland, we had congressional districts of 750 to 800,000 people, and we had other congressional districts of 100,000 and 200,000.

The State legislature, for a number of years, did not make any successful effort to equalize the districts, or to even bring them within 10 percent or 20 percent of each other. The Congress made some attempts at passing national legislation to require more or less equal congressional districts.

Here in the Congress, I remember the House and the Senate passed different resolutions, and in the conference committee the Senate conferees, led by Senator Kennedy, adopted the House ver-

sion, and the House conferees adopted the Senate version. The net result was that the Congress also was unable to successfully pass any redistricting bill.

So, you had the legislative branch of Government at both the State and the Federal level completely incapable of coping with a serious problem. Now, in that situation, were the courts right to step in?

Judge TELESCA. Mr. Chairman, I still feel that it is a legislative matter. Even though the Congress agonized over it and was unable to agree upon it, I still, in all respect to you, sir, and the sanctity of this——.

Senator MATHIAS. It is not a question of respect to me, because I was beating on the legislatures and on the Congress to do something.

Judge TELESCA. Well, that is my feeling. I feel that it is a legislative matter. Even though no decision was arrived at within these hallowed halls, I think they should get back to work and keep trying for it. I do not feel the courts should——.

Senator MATHIAS. Should enter the political thicket?

Judge TELESCA. No, sir. I do not feel that the district courts have legislative power.

Senator MATHIAS. Well, some day when you have a moment to reflect, you might want to look at the opinion of a very great judge who ended up with the unhappy task of redistricting the State of Maryland—the late Simon Sobeloff. He was a man of great judicial knowledge and also of great practical wisdom, and he is the kind of judge that illuminated and ornamented the Federal bench in Maryland.

The phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues not properly within the scope of their authority. What does that phrase, "judicial activism," mean to you?

Judge TELESCA. It means to me that the whole premise of the Constitution is in a sensitive balance of power; that the judiciary has its role, and it has been spoken to and defined and redefined over the years. I feel it has a traditional role—one that is not legislative in nature. Its role is clearly cut out.

I feel that the courts have a right to be social critics, but necessarily to be social planners.

Senator MATHIAS. Well, what good is it for a judge to be a social critic if he is not prepared to use the extraordinary powers vested in the judiciary to improve the conditions that he criticizes?

Judge TELESCA. Many times, in criticizing you improve; by calling to attention, you improve. By calling it to the attention of the legislature, you ask them to improve, which is where I feel the power should lie.

I am not saying that in no situation whatsoever would I not bring the power of my court to rectify an obvious unfair situation, but I say I do so fully mindful of the fact of the separation of powers and the restraints that federal judges should exercise in this area.

Senator MATHIAS. Of course, just as the Founding Fathers indicated, the separation of powers should not be absolute.

Judge TELESCA. And indeed it is not.

Senator MATHIAS. And it certainly is not.

I would hope that in your successful career on the bench, you would have that degree of flexibility that the Founding Fathers imprinted upon the pages of the Constitution. Thank you very much.

Judge TELESCA. Thank you, sir.

Senator MATHIAS. I will ask Judge Nordberg to resume the stand. Judge, you were previously sworn.

TESTIMONY OF JOHN A. NORDBERG, NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF ILLINOIS

Judge NORDBERG. Yes, sir.

Senator MATHIAS. You served on the Illinois Judicial Conference Committee on Judicial Education since 1978, a committee that I believe is responsible for conducting a statewide judicial education program.

Judge NORDBERG. That is correct, Senator.

Senator MATHIAS. What would you think about the possibility of requiring lawyers to undergo special training before being allowed to practice in the Federal courts?

Judge NORDBERG. We do have in——

Senator MATHIAS. And that is an educated question because I was a country lawyer of a very green variety and, to me, to enter the U.S. district court was an awesome experience, one in which my awe was only exceeded by my ignorance.

Judge NORDBERG. Well, as you perhaps know, the Northern District of Illinois has been selected as one of the target areas for a pilot project along those lines, and there have been some guidelines that have been promulgated by Judge Aspen, as chairman of the committee, in which they would require, after the grandfather clause for those that now practice in the Federal courts would have expired—they would require the new lawyers practicing to have served a required number of hours, in effect, as second chair in trials of Federal cases, and also would have to pass a peer review testing requirement to be sure that they are sufficiently qualified.

This has been attacked by both the Chicago and Illinois State Bar Associations, as well as the American Bar Association. The concern about it is that it may create an elitist barrister-type of system where the Federal courts perhaps would not be fully and freely available to all of our citizenry.

Senator MATHIAS. And it would make the Federal bar something other and different.

Judge NORDBERG. Yes, it would.

Senator MATHIAS. Which, frankly, I think it tends to be anyway.

Judge NORDBERG. My experience has been that the lawyers practicing in the Federal court have great qualifications. In fact, I have been amazed at the high quality of the lawyers that have appeared before me in State court. So, I am not so sure how great the problem is.

I do know that Chief Justice Burger has been concerned about this for a long time. I do not know what the end result will be. This pilot project has not gone into effect yet, so it is still in the discussion stage.

Senator MATHIAS. Well, if you can view it from the eminence of the bench, you might keep an eye on it and this committee would like to know how it comes along.

Judge NORDBERG. It is interesting, Senator, that right now there is a statewide program to elicit the views of lawyers throughout the State that has been undertaken by the State bar as to whether they will require mandatory, continuing legal education for all lawyers in the State. And it may very well be that Illinois will go that route.

So, in essence, available for both the State and the Federal bar will be this requirement of continuing legal education. There is no question that the law is more complicated all the time, and it is more demanding on lawyers in order for them to be qualified to properly represent their clients.

MAGISTRATES

Senator MATHIAS. Who was it that said, "Oh, that mine enemy should write a book"? You have written an article, in any event, which appeared in the Illinois Bar Journal, entitled "A Blueprint of the New Magistrate System." And it was such a persuasive article that your proposal was adopted.

Do you believe that the U.S. magistrates are being properly utilized at the present time, or would you make suggestions for improvement in the system?

Judge NORDBERG. Well, Senator, as you know, I have been in the State court system now, so I have not had the opportunity to be fully acquainted with how the Federal magistrate system is in operation. As I understand it from various judges that I have talked with, they think it is very helpful to the court and that it is working well.

I do know that they are used particularly in setting of bonds and in the discovery area, and various judges have been using magistrates to a much greater extent, also. So, I think there is a lot of flexibility in it. I think everyone is learning, and I think it is a very desirable development. Undoubtedly, it can be improved as time goes on.

Senator MATHIAS. Well, you will not be precluded from writing articles as a judge.

Judge NORDBERG. No; I really would love to be able to do that. As I indicated, I have always wanted to have more time to do that. I know how busy we are going to be because we have been forewarned. I do not know that forewarned is forearmed, but there is a substantial caseload that we will be getting when we get on the bench.

WORKLOAD

Senator MATHIAS. Well, now, speaking of how busy you are going to be, there is apparently a permanent workload which gets behind in the Federal courts. Are you prepared to tackle that backlog and carry that workload, even though it requires more hours than you have been required to spend in the past?

Judge NORDBERG. Yes, Senator. I think maybe one of the requirements for a Federal judge is to be a workaholic, and I am afraid I

qualify for that. I am also kind of used to backlogs, because in the law division where I now sit, in the circuit court of Cook County, we have a backlog of over 72,000 cases, with only 36 judges. So, we are very familiar with the backlog problem.

I realize it is going to take a lot of hard work, but I do think, with the additional judges now that the northern district gets, we will be able to make a good improvement on that problem.

LIFE TENURE

Senator MATHIAS. And the fact that this is a lifetime appointment does not diminish your awareness of the magnitude of this problem and the responsibility of the judge?

Judge NORDBERG. Senator, no. It has been a lifetime goal of mine to become a Federal judge, and I really look forward to spending the rest of my life doing my very best.

JUDICIAL ACTIVISM

Senator MATHIAS. In response to the portion of the questionnaire relative to activism you stated:

> Ours is a Government of laws, and as Federal trial judges, we should follow the laws established by the Constitution, the Congress, and the courts. We, as judges, should not be superlegislators, zealously seeking to impose our personal views on society.

Would you care to elaborate on that?

Judge NORDBERG. Well, as I indicated in the full answer, I think, as Federal judges, everyone would agree that we do have awesome powers, and I think that we have to be extremely careful in how we use those powers. I think, as has been indicated by the judge from New York, we do not have the facilities to carry on the function of the legislature or the Congress.

We do not have the ability of having congressional hearings; we do not have the staff. We do not have the ability to develop materials in order to make a complete, reasoned decision on a given area. The judges have to act within the context of a lawsuit, and I think there is very grave danger for us to in any way permit ourselves to get outside of the fact that we are deciding a lawsuit, that we are not trying to prescribe for mankind.

Senator MATHIAS. What about the case I cited in which constitutional guarantees of representation were being denied, or at least unevenly distributed, and the legislative branch had proved itself incapable of providing a constitutional remedy?

Judge NORDBERG. We just had that in Illinois, Senator, with a lot of unhappiness ultimately generated from the map that the court did finally decide on. I do think that you should defer as long as you possibly can to the Congress and the executive branch. But at some point in certain areas, a line does have to be drawn, and if they are unable to act, then the court would have to act.

Senator MATHIAS. At some point, the checks and balances require that when one moves down, the other moves up.

Judge NORDBERG. That is right. I do think in past history, at one point it went over 10 years, and at some point you do have to draw the line, I believe.

Senator MATHIAS. Well, I agree with that, and I do not think it is in contradiction to your earlier statement that you should not impose your own views.

Just as I would not ask you your views on abortion at this moment, I thought it was improper in this committee to ask Justice O'Connor her views on abortion, because the real question is not what her views on abortion are, but whether she will apply the law on that and all other subjects.

Judge NORDBERG. That is correct.

Senator MATHIAS. Well, I thank you very much for your answers.

Judge NORDBERG. Thank you very much, sir.

Senator MATHIAS. I will ask Mr. Hart next to come to the table. I believe that Mrs. Hart is with you?

TESTIMONY OF WILLIAM T. HART, NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF ILLINOIS

Mr. HART. She is, Mr. Chairman.

Senator MATHIAS. Well, it is a pleasure to welcome her to the Judiciary Committee.

JUDICIAL ACTIVISM

You informed the committee, in response to a question on activism, since that seems to be a subject of some concern these days, that courts are not ordinarily required or able to act as administrators with oversight responsibilities of agencies and other branches of Government.

That word "ordinarily" seems to set out an area of exception; maybe that is the area of flexibility that I mentioned a minute ago.

Mr. HART. I had in mind, Mr. Chairman, the situations that you were describing. In those instances where reviewing courts have ordered district courts to take jurisdiction to carry out the mandates of the upper courts, I think the district court judge particularly ought to be very cautious about the exercise of judicial power and should defer to the reviewing courts, of course, and to Congress before extending the jurisdiction of the court.

Senator MATHIAS. One of the greatest judges I ever knew—and perhaps the greatest—once said to me, "You know, in this constitutional system, there are so many opportunities for the whole system to become frozen, stalemated, immobile. If that happened, then the forces would break it apart. But that element of goodwill is the lubricant that makes constitutional government work."

It seems to me that that is an enormously important principle for legislators to remember, judges to remember, and certainly for officials in the executive branch to remember.

Mr. HART. I would wholeheartedly agree with that statement, Mr. Chairman.

Senator MATHIAS. The sound you have heard indicates another rollcall vote on the floor of the Senate. I am hesitant to go because I may come back with a still smaller salary than I left with. [Laughter.]

The committee will stand in recess.

[The committee was recessed from 3:08 p.m. until 3:36 p.m.]

Senator MATHIAS. The committee will come to order.

I would like to be able to give you a box score on developments on the floor with respect to congressional salaries, but it has become so confusing that I do not believe anybody knows anymore. [Laughter.]

It just makes the value of the constitutional protection of judicial salaries even more valuable. [Laughter.]

Your last answer, Mr. Hart, I think reflects what you also informed the committee, which was that:

> In a limited number of instances, courts have erred in assuming the responsibility to decide social questions. But I believe that for the most part, the Judiciary has no choice but to consider such questions.

Mr. HART. Yes, sir.

Senator MATHIAS. And I think the Maryland case that I cited is surely one of those.

Mr. HART. Yes, sir, I agree.

PERSONAL FINANCES

Senator MATHIAS. Would you describe the arrangements that you have made to dissolve your financial interest in your law firm?

Mr. HART. Yes, sir. Under our partnership agreement, when I resign in order to take the oath as a judge, I will lose all interest in any of the firm's business. The firm then will pay me my capital account immediately, and my drawing account. The only remaining interest I will have will be in a retirement program, which is administered by a securities firm outside of the firm itself.

There may be some few dollars due me on an investment that the firm may have in securities during the year which we have available for cash-flow purposes. Otherwise, I will have no interest in the firm.

Senator MATHIAS. Is your retirement income fixed?

Mr. HART. No, sir. It is an H.R. 10, Keogh plan-type retirement program, which will not be available to me until I am 59½ years of age.

Senator MATHIAS. That will be a long time.

Mr. HART. Not too long, sir. In any event, that will be administered by an outside securities firm.

Senator MATHIAS. But it will not fluctuate in response to the level of fees being collected by your former partners?

Mr. HART. No. The firm will make no further contributions to that fund.

Senator MATHIAS. What kind of guidelines do you believe a judge should follow in determining the propriety of Federal intervention into State affairs?

Mr. HART. Well, in this instance, my thinking process relates to the fact that I am nominated to be a U.S. district court judge, and I think that a district court judge has before him the responsibility of factfinding and the application of the law as it is laid down primarily by the Congress and by the reviewing courts.

So, therefore, I would look first for guidance from the statutes and from the reviewing court in terms of extending the court's jurisdiction at all. I think that a district court judge ought to exercise the least amount of power necessary to resolve a given matter before him.

Senator MATHIAS. Thank you very much, Mr. Hart.

Mr. HART. Thank you, Mr. Chairman and staff.

Senator MATHIAS. I appreciate your patience in this extended process.

Mr. Black?

VIOLENT CRIME

In a previous incarnation, it fell to your lot to perform the duties of U.S. attorney, and in that position, as I well remember, you prosecuted all types of crimes. Today, the United States faces a very high volume of violent crime. The Attorney General recently sat in the chair where you are now sitting and told this committee that the problem of violent crime was very high on the list of priorities for the Department of Justice.

Do you see, in the light of your experience as a U.S. attorney and as a practicing lawyer in the Federal courts, any role for the Federal judiciary in dealing with this problem of violent crime?

TESTIMONY OF WALTER E. BLACK, JR., NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF MARYLAND

Mr. BLACK. Indeed. I think the situation is such that the crime problem is one of the primary problems we have in this country today. Certainly, in my community every citizen is conscious of it every moment of the day, and I think, in effect, this means that what is required is almost a total war and all the resources of the government, really, at all levels.

So, those areas in which a Federal role is appropriate, as indeed in a number of violent crimes it is today, such as bank robbery, the Federal courts should indeed play a major role. And if the Federal law enforcement authorities are, in many cases, better able to develop cases involving violent crime and do a better job than the States, then I think this is appropriate.

It is an emergency in this country probably everywhere; certainly, it is in our city.

Senator MATHIAS. Of course, you and I are old enough to remember one of the jingles that used to play, I think, on radio; it was before the days of television. It was a jingle that was intended to sell Dodge automobiles and it went something like this: "it is bigger on the inside but smaller on the outside," and on and on and on.

Now, that is a little like the Department of Justice's war against violent crime; they hope it is going to be bigger on the outside but smaller on the inside. They are reducing the funds for these agencies that would normally fight violent crime, including bank robbery, but expecting a larger effort.

Against that background, do you believe that the role of the Federal judiciary will be more difficult?

Mr. BLACK. I am sure it would be. If the funds are not as available, the Federal role will be less; there will not be as many Federal prosecutions. Severe cuts in funds would presumably mean that the Federal investigations might not be as effective or as efficient.

I guess this is a problem at every level, Mr. Chairman. The States all are feeling the pinch, though I think the public outcry in

the crime field is such that I think we are seeing it at Annapolis during this session; the legislatures are having to give full attention to this as a major problem.

JUDICIAL ACTIVISM

Senator MATHIAS. In responding to the Committee questionnaire you said:

> The remedies used by the Federal judiciary must be in accordance with law in resolving the matters pending before it, recognizing that judicial restraint is appropriate in considering such matters as scope of judicial orders, jurisdictional standing, ripeness, and particularly the role of the judiciary as the administrator of governmental institutions with continuing oversight responsibilities.

Can you foresee any circumstances where the U.S. district court for the district of Maryland would have a continuing administrative responsibility to oversee the implementation of one of its orders, and if so, what are the standards that you would use in deciding that there was such a responsibility?

Mr. BLACK. Well, of course, a district judge is going to really be bound by precedent. If the Chairman please, you are alluding to things that indeed the district court in Maryland already has continuing responsibility for, at the very least in the prison field and in the school field.

These are areas that pose the problems that I think we are all wrestling with. I suppose it would be inappropriate for me to go into much detail.

Senator MATHIAS. Well, I think that is precisely correct. There are such orders now involving educational and penal institutions, so it is not a theoretical matter; it is a matter of actual practice.

Perhaps a most common dilemma for a judge is how to resolve a conflict between your own conscience and your own personal sense of justice and what is the inescapable and clear mandate of a statutory or constitutional provision of law. How should that be resolved?

Mr. BLACK. I think there is no question that that has to be resolved in accordance with law and constitutional provisions. If those mandate a result that is different from one's own personal beliefs or conscience, that makes this a tough job, but I guess we all know that that is what this is going to be, a tough job.

Senator MATHIAS. Well, pressing you just a little further—and, certainly, I would agree that the court is bound by the law and must, perhaps, not abandon its own conscience, but at least step aside from personal views and apply the law. But the laws of the State may be applicable; the binding precedents of prior court decisions may be applicable.

What do you consider the proper application of stare decisis in constitutional law? And if I can be a little more specific, what is the duty of a Federal judge when confronted with a case in which one of the precedents of the court clearly conflicts with the Constitution, as that judge interprets it?

You have to choose between your reading of the Constitution and the judgment of your predecessors.

Mr. BLACK. Well, I think, Mr. Chairman, that depends on exactly the setting in which it comes up. If the case is on all fours with a

decision in the fourth circuit or by the Supreme Court of the United States, I have no choice but to follow those decisions. If I do not, I would be very quickly reversed, and to do otherwise would be an exercise in futility.

If it is not on all fours, then it seems to me the judge is faced with the same decisionmaking process as he has in anything else. He has got to weigh out all of that authority, and one of those authorities would be the Constitution, as he reads it and understands it.

Stare decisis has got great weight, but if it is not on all fours, the judge still has to make the decision as he sees it.

Senator MATHIAS. Then the case may be distinguished?

Mr. BLACK. That is correct.

Senator MATHIAS. Well, thank you very much, Mr. Black, for your responses.

Mr. BLACK. Thank you, Senator.

Senator MATHIAS. Let me ask the nominees if any of them have anything further they would like to add to this hearing.

[No response.]

Senator MATHIAS. Is there anyone else in the room who wishes to be heard with respect to these nominations?

[No response.]

Senator MATHIAS. The committee will stand in recess, subject to the call of the Chair.

[Whereupon, at 3:50 p.m., the committee was adjourned, subject to the call of the Chair.]

BIOGRAPHIES

MICHAEL A. TELESCA

NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF NEW YORK

Birth: November 25, 1929, Rochester, N.Y.

Legal residence: New York.

Marital status: Married to Ethel Hibbard Telesca, 2 children.

Education: 1948-52—University of Rochester, A.B. degree; 1952-55—University of Buffalo School of Law, J.D. degree.

Bar: 1957—New York.

Military service: 1955-57—U.S. Marine Corps.

Experience: 1957-73—Lamb, Webster, Walz, Telesca & Donovan, Rochester, N.Y. (firm has had several different names); 1973 to present—Surrogate court judge, Monroe County, N.Y.

WALTER E. BLACK, JR.

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF MARYLAND

Birth: July 7, 1926, Baltimore City, Md.

Legal residence: Maryland.

Marital status: Married to Catharine Foster Black, 3 children.

Education: 1943-46—Harvard College, B.A. degree; 1946-49—Harvard Law School, LL.B. degree.

Bar: 1949—Maryland.

Experience: 1949-53—Hinkley & Singley, associate; 1953-55—Assistant U.S. attorney, District of Maryland; 1956, 1957-67—Hinkley & Singley; partner; 1956-57—U.S. attorney, District of Maryland; 1968 to present—Clapp, Somerville, Black & Honemann, partner.

WILLIAM T. HART

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF ILLINOIS

Birth: February 4, 1929, Joliet, Ill.
Legal residence: Illinois.
Marital status: Married to Catherine Motta Hart, 5 children.
Education: 1946-48—Loyola University, 1948-51—Loyola University School of Law, J.D. degree.
Bar: 1951—Illinois.
Military service: 1951-53—U.S. Army.
Experience: 1951—W. O. Herschbach, associate; 1954-56—Assistant U.S. attorney, Number District of Illinois; 1956-59—Defrees & Fiske, associate; 1957-58—Special assistant attorney general of Illinois (part-time); 1959 to present—Schiff, Hardin & Waite, partner; 1960—Special assistant state's attorney of Cook County (part-time).

JOHN A. NORDBERG

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF ILLINOIS

Birth: June 18, 1925, Evanston, Ill.
Legal residence: Illinois.
Marital status: Married to Jane Spaulding Nordberg, 4 children.
Education: 1943-44, 1946-47—Carleton College, Northfield, Minn.; 1947-50 University of Michigan Law School, J.D. degree.
Bar: 1950—Illinois.
Military service: 1944-46—U.S. Navy.
Experience: 1950-57—Pope & Ballard, associate; 1957-76—Pope, Ballard, Shepard & Fowle, partner; 1957-65—Justice of the peace, magistrate, Circuit Court Cook County, Ill. (part-time); 1958-76—Wilmette Park district attorney (part-time); 1961-65—Village of Glenview attorney (part-time); 1969-74—Village of Morton Grove attorney (part-time); 1976 to present—Circuit court judge, Cook County, Ill.

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